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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1179

GEORGE RAMSEY, LEON NUNLEY, d/b/a LEON NUNLEY COAL COMPANY; PAUL GIBBS, d/b/a PAUL GIBBS COAL COMPANY; LOIS HALL TRAVIS, Administratrix of the Estate of W. J. Travis and J. H. GRAHAM, d/b/a NINTH WEST COAL COMPANY; A & R COAL COMPANY, INC.; W. T. MORRISON and J. H. GRAHAM, d/b/a M & G COAL COMPANY; J. H. GRAHAM COAL COMPANY, INC.; W. T. MORRISON and LOIS HALL TRAVIS, Administratrix of the Estate of W. J. Travis, d/b/a M & T COAL COMPANY; STEPHENSON BROTHERS COAL COMPANY, INC.; EDWARD NUNLEY, d/b/a EDWARD NUNLEY COAL COMPANY; EAST VALLEY COAL COMPANY, INC.; ELLIS WARD and LON L. VARNELL, d/b/a TRACY CITY COAL COMPANY; HENRY WILLIS FLYNN, d/b/a WILLIS FLYNN COAL COMPANY; H. W. FLYNN COAL COMPANY, INC.; HOWARD HIGGINS, d/b/a HOWARD HIGGINS COAL COMPANY; HOWARD HIGGINS COAL COMPANY, INC.; MARSHALL MEEKS; TENNESSEE PRODUCTS AND CHEMICAL CORPORATION, *Petitioners,*

v.

UNITED MINE WORKERS OF AMERICA, *Defendant.*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITIONERS' BRIEF

OPINIONS BELOW

The opinion filed by the Court of Appeals September 26, 1969, appears in 416 F.2d 655. The opinion of the District Court is in 265 F. Supp. 288.

JURISDICTION

The judgment of the Court of Appeals affirming the Trial Court's judgment was entered September 26, 1969, and the Court overruled petition to rehear on December 16, 1969. Petition for a writ of certiorari was filed February 13, 1970, and granted March 30, 1970. This Court's jurisdiction is invoked under 28 U.S.C., Sections 1254(1) and 2101(c).

STATUTES INVOLVED

The statutory provisions involved are Sections 1 and 2 of the Sherman Act (15 U.S.C. 1, 2); Sections 4 and 6 of the Clayton Act (15 U.S.C. 15, 17); Section 20 of the Clayton Act (29 U.S.C. 52); Sections 2, 4 and 6 of the Norris-LaGuardia Act (29 U.S.C. 102, 104 and 106); the Labor-Management Relations Act (29 U.S.C. 141, 151, 157 and 158(b) and (e)); and the Employment Act (15 U.S.C. 1021, 1022, 1024(a), (b) and (c)).

QUESTIONS PRESENTED

1. When the District Court, sitting without a jury, found that a preponderance of evidence derived from the clearly authorized acts of UMW's international officers proved an implicit agreement with business groups violating antitrust policy, was the Court in error in entering judgment for UMW because these clearly authorized acts proved the existence of the agreement only by a preponderance of evidence, holding that the standard of "clear-proof" in Norris-LaGuardia Act's Section 6 must be applied not only to ultimate conclusions which are to be drawn from those acts in an antitrust case against the union (the Court

of Appeals being divided four to four on this question after considering it in banc)?

2. When 82% of the industry, having hundreds of bargaining units, has been signed up under the 1950 National Bituminous Coal Wage Agreement and its later amendments with uniform terms that have been impossible of performance for most companies in the country and for all companies in the Southeastern Tennessee Field, and when the major industry units have demanded and received from UMW a written agreement restricting UMW to future bargaining only on national contract terms, is this restraint valid under the Sherman Act simply because, under UMW's contention adopted by the District Court, the restraint can be construed to apply to future agreements only with the units in the 82% of the industry (including petitioners) already under the 1950 National Bituminous Coal Wage Agreement as Amended and not to the 18% of the industry not yet organized under the contract?

3. When a national labor contract, with repeated flat increases or rates for all jobs in the same amount, is not only destroying competition but is also forcing all companies to mechanize to the hilt or be destroyed, resulting in two-thirds of the men losing their jobs, was the Court right in holding the national contracting arrangement was legal because of the general right extended to unions to make labor contracts under National Labor Policy without any consideration at all of National Policy on Employment (U.S.C., Title 15, Chapter 21, Sections 1021 et seq.)?

STATEMENT OF THE CASE

A. Nature of the Case

Petitioners, Ramsey, et al., were coal mining companies who operated in the Southeastern Tennessee coalfield. They joined as plaintiffs in filing this case against United Mine Workers of America on January 6, 1961 (2a).* The suit was brought for damages under Sections 1 and 2 of the Sherman Act. On January 6, 1965, pursuant to permission granted by the Court, petitioners filed a supplemental complaint bringing the later years through 1964 into the damage period covered by the case (5a).

This case was tried by the District Court in Chattanooga sitting without a jury in the fall of 1965. The Court filed its opinion, containing findings of fact and conclusions of law, on March 4, 1967 (61a-167a) 265 F. Supp. 388. Final judgment dismissing the case in accordance with the opinion of the Court was entered March 9, 1967 (168a). The appeal of these parties was Case No. 17,878 in the Court of Appeals.

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* This appeal originated before the new rules of appellate procedure. Each party filed an appendix in the Court of Appeals and printed enough copies for filing in the Supreme Court. The case is here on a stipulated record consisting of these appendices of both parties plus the proceedings in the Court of Appeals. By agreement and after consulting the Clerk's office, the printed appendix in this Court also consists of these appendices (previously printed) plus the Court of Appeals proceedings. There are eight volumes in the appendix. The first four (Vols. I-IV) consist of the appendix filed by petitioners in the Court of Appeals with page numbers followed by the letter "a"; the next three volumes (Vols. V-VII) consist of the appendix filed by respondent in the Court of Appeals with page numbers followed by the letter "b"; the eighth volume consists of the proceedings in the Court of Appeals and its pages are not lettered. References in this brief will designate pages by giving the letters "a" or "b" or no letter, depending on the volume to which reference is made.

Another coal producer in the Southeastern Tennessee field had filed a separate case against UMW with the identical theory as this case in the same court, this being petitioner Tennessee Products and Chemical Corporation (46a). On December 5, 1966, by an agreed order, the Tennessee Products and Chemical Corporation case was submitted to the Court for adjudication on the issue of liability upon the trial record made in the instant case (58a). The opinion of the Trial Court included both cases and Tennessee Products and Chemical Corporation also appealed from the final judgment entered against it, its appeal being Case No. 17,879 in the Court of Appeals.

The Court of Appeals combined these cases for hearing before a three judge panel and after entry of the three judge decision covering both cases favorable to petitioners and reversing the judgment below, and after filing of a UMW petition to rehear in banc the full Court, without further argument or answer on UMW's petition, filed its opinion covering both cases on September 26, 1969, overruling the three judge panel and affirming the judgment below, the Court being equally divided four to four on this decision and two opinions being filed. The Court overruled petition to rehear by these petitioners on December 16, 1969, with a three judge dissenting opinion being filed on that action.

The theories of the parties and the issues in this case are set forth in the Pre-Trial Order as well as in the Opinion of the Trial Court (12a-20a, 63a-66a). In summary, the petitioners contended that commencing in 1950 UMW engaged in a conspiracy with business groups, the major coal producing companies of the country, to control the coal industry in the Southern

Appalachian coalfields, to eliminate and suppress competition, to boycott the petitioners and others engaged in coal mining, to control the market and to fix and control prices and otherwise create a monopoly. The principal part of the theory was that the conspiracy called for the imposition of the National Bituminous Coal Wage Agreement of 1950 as it was negotiated and amended from time to time by UMW and associations representing major coal companies (particularly Bituminous Coal Operators Association (BCOA)), upon all companies in the industry, including the smaller companies and including petitioners, even though it was impracticable or impossible for those companies to abide by the terms. The contract terms were tailored to fit the conditions of the major companies and those companies prospered and expanded while the lesser units were unable to comply with the contract and many were forced out of the industry.

One phase of petitioners' theory was that UMW acquired control and ownership of major coal companies, particularly West Kentucky Coal Company and its subsidiary, Nashville Coal Company, which were competing with petitioners for the large, new TVA steam coal market. The companies owned by UMW were benefited in this competition by UMW's national contracting policy and were able to greatly expand their share in the TVA market while UMW had petitioners shut down by reason of the union's refusal to allow modification in the national contract terms so as to make the contract practical in the peculiar conditions of southeastern Tennessee.

But the principal part of the theory, as stated, was not that UMW was simply using union power to benefit union owned companies in a competitive situation,

this was a secondary contention. The principal theory was that UMW ganged up with the major companies of the country and associations representing those companies and used the repeated flat increases in amendments to the national contract, fitted to intense mechanization in thick and regular seams of coal (conditions readily available to major coal combines), which terms becamc more and more impossible for the lesser companies who could not match these conditions.

The opinions of the Supreme Court in *Pennington* v. *United Mine Workers*, 381 U.S. 657 (1965), pronounced legal principles applicable to this case. The majority opinion, written by Mr. Justice White, with whom Mr. Justice Brennan and the Chief Justice joined, said, in part:

> "We have said that a union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers. No case under the antitrust laws could be made out on evidence limited to such union behavior.[2] "

"[2] Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some of the employers cannot effectively compete if they are required to pay the wage scale demanded by the union. The union need not gear its wage demands to wages which the weakest units in the industry can afford to pay. Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy." 381 U.S. 665.

The Trial Court (as did the Trial Court in the second *Pennington* trial, 257 F. Supp. 815, affirmed 400 F.2d 806) placed almost exclusive emphasis on the fore-

going language, but it is to be noticed that the above quoted footnote had not gotten to the specific question of *industrywide* bargaining by one bargaining unit where there are hundreds of units in the industry.

We do not believe the Court meant to say the union may abandon good faith bargaining in all the other units as this would frustrate one prime purpose of National Labor Policy as well as antitrust policy. We believe the ensuing language about attempts by one bargaining unit to settle matters for an entire industry needs to be given more than a secondary consideration, because this record establishes clearly such an attempt resulting in more than a decade of industrywide uniform contracts without any deviation allowed in other units. But that part of the opinion has been virtually stripped of meaning in the later cases.

In the *Pennington* case Mr. Justice Douglas, joined by Justices Black and Clark, filed a concurring opinion the language of which has never been applied in, and has been criticized as contradictory and meaningless by, the Trial Courts in this case and in the second trial of *Pennington*.

B. The Decision of the Trial Court Sitting Without a Jury

The opinion of the Trial Court in this case makes an analysis of the Supreme Court opinions in *Pennington* and summarizes those opinions as follows:

> "By way of summary, while Justice White would require proof of the conspiracy between the union and the favored employers, he would appear to require no proof that the purpose was to put other employers out of business. On the other hand, Justice Douglas would require that it be made to appear that the agreement was 'made for

> the purpose of forcing some employers out of business,' but he would hold that any industry-wide collective bargaining agreement setting a wage scale that exceeded the financial ability of some employers to pay creates a prima facie case of conspiracy. Neither the per se rule of Justice White nor the prima facie rule of Justice Douglas appears to have received the support of a majority of the Court" (78a). (265 F.Supp. at 399)

At another place the Trial Court said:

> "Moreover, to suppose that national collective bargaining can or will be conducted with other than major producers of an industry is a theory unrelated to the hard realities of a competitive economy. To suppose that major operators can or will be the guardians or protectors of the small and weak in the industry in such national bargaining is also largely a theory unlikely to relate to the realities of a competitive economy.
>
> "The problems posed to the small and medium sized enterprises by the practice of national collective bargaining would appear real and substantial. However, that their solution lies in the federal antitrust laws as now enacted by Congress is doubtful." (153-4a) (265 F.Supp. at 433)

Not anticipating the above quoted rejection of the Sherman Act, petitioners went to trial with confidence in the latter part of the majority opinion and the concurring opinion in *Pennington*. There was not available evidence in the form of confessions by the alleged conspirators that they were in a predatory frame of mind when they did what they did (although there was direct evidence they were trying to stabilize prices). But that sort of evidence is lacking in most Sherman Act cases because it is hard to get any witness to confess to being willfully predatory.

A central part of the contentions of petitioners was that UMW repeatedly negotiated amendments to the National Contract with Bituminous Coal Operators Association (BCOA), a bargaining association that represented major companies in the northern coalfields. These contracts were then applied by the union to all other bargaining units with disastrous results to all companies in the Tennessee fields, and repressive effects to competition in most of the industry elsewhere. And, on December 3, 1958, UMW and BCOA negotiated the "Protective Wage Clause" as an amendment to the 1950 National Bituminous Coal Wage Agreement. It was the contention of petitioners that this Protective Wage Clause was violative of antitrust policies as expressed particularly in the majority opinion in *Pennington*. The Protective Wage Clause is fully set forth at 1105a-1111a. The implementation of this Clause did not take place until after the end of the period involved in the *Pennington* case, so the clause was only fleetingly referred to on the *Pennington* appeal previously in this Court.

It is settled in this record that it was the business group with whom UMW negotiated that demanded the restraints on UMW's bargaining policy contained in the 1958 Protective Wage Clause (1029a). This was a clause *inserted* by amendment into the 1950 contract and the first part of that clause reads:

> "The United Mine Workers of America (which, as used in this Clause, includes all of its Districts, Local Unions, Officers or Agents) and the Operators signatory hereto affirm their intention to maintain the integrity of this contract in all of its parts. The objective of this contract is to provide the maximum possible continuity and stability of employment under the conditions set forth herein.

The parties hereto agree that bituminous coal mines shall be so operated as not to debase or lower the standards of wages, hours, safety requirements and other conditions of work, established by this contract. The parties recognizing their obligation each as to the other to exercise all possible efforts and means to attain these objectives further agree as follows.

"A. During the period of this contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this contract on any basis other than those specified in this contract or any applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this Contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto" (1105a-1106a).

These provisions were followed by a provision for a boycott of coal of non-complying producers in Paragraph B and by later paragraphs that established a tribunal to police the carrying out of the clause and to conduct investigations and trials with respect to violations either on the side of the union or the operators.

As found by the Trial Court the petitioners and the other companies of Southern Tennessee were under the national contract, including this Protective Wage Clause. These companies (as related below) found the contract was impossible. They tried to get UMW to modify the terms to be more practical for the various methods of production used in the peculiar Tennessee

Field but UMW would allow only national contract terms. The inability to reach a contract resulted in the strike that was still going on at the time of trial (141a). (265 F.Supp. 428)

The Trial Court went along with UMW's contention, that once a bargaining unit agreed to the national contract it was fair and legal for the major companies to insist that the union keep that unit under the national contract and not modify the terms when it later sought to get out from under it so that unit could continue to compete. Having established this proposition, UMW contended that Paragraph A of the Protective Wage Clause should be construed to mean that the restraints on UMW's contracting policy were to apply only with respect to employees (and as a consequence, only with respect to units of employers) who were already under the contract. In other words it was contended that the language "covered by this contract" in the first sentence of Paragraph A modifies the word "employees" and not "wages, hours or other conditions of work." The Trial Court as well as one of the four judge groups on the Court of Appeals went along with this proposition.

The Trial Court said:

> "It is the position of the U.M.W. that, just as the operators who signed the agreement committed themselves under the provisions of Paragraph B not to evade or debase the labor standards set out in the agreement by subcontracting the purchase of coal produced at substandard levels or subleasing coal lands where the result would have different consequences, so the Union assured operators who were signatory to the agreement that it would not enter into or permit any agreement governing labor standards 'applicable to employees covered

by this contract' on any basis other than those specified by the contract. Under this construction of the clause there would be no forfeiture of the Union's exemption under the antitrust laws in accordance with the above language of the Supreme Court in the Pennington case.

"The Court is thus confronted with a construction of the meaning of the language used in Paragraph A of the Protective Wage Clause. The language used is not without ambiguity. The plaintiffs in effect concede as much when they state, 'While the sentence does not affirmatively state that the Union will take this contract and force it on all other bargaining units,' the language can only mean just that.

"The law is well settled in this regard that where two constructions of a written contract are reasonably possible, preference must be given to that one which does not result in a violation of law. *Great Northern Railway Co.* v. *Delmar Co.,* 283 U.S. 686, 75 L.Ed. 1349, 51 S.Ct. 578; *Perry Coal Co.* v. *N.L.R.B.*, 284 F.2d 910; *Williston on Contracts*, Sec. 236. Applying such a rule of construction to the language of Paragraph A of the Protective Wage Clause, it appears that should the language be given the construction contended for the plaintiffs, a violation of law would result, whereas should the construction contended for by the defendant be given, no violation would occur. The Court must accordingly adopt the latter construction and conclude that the Protective Wage Clause did not by its terms forfeit the Union's exemption from the antitrust laws. Upon this same issue the United States District Court, upon retrial of the *Pennington* case, reached the same conclusion with respect to the proper construction of the Protective Wage Clause. See *Lewis* v. *Pennington,* 257 F.Supp. 815 at 862 (D.C.E.D. Tenn., 1966).

"Having concluded that the Protective Wage Clause does not constitute an express commitment upon the part of the U.M.W. to the B.C.O.A. not to bargain with any other coal operator upon any terms other than the national contract, this does not conclude the issue of whether the U.M.W. did in fact, though not expressly, so contract with the B.C.O.A. Were this case being tried upon the usual preponderance of the evidence rule applicable to civil cases, the Court would conclude that the U.M.W. did so impliedly agree. However, the standard of proof where a labor union is involved is 'clear proof,' as required by Section 6 of the Norris-LaGuardia Act, a standard different from the ordinary civil burden of persuasion. *United Brotherhood of Carpenters* v. *United States,* 330 U.S. 395, 91 L.Ed. 973, 67 S.Ct. 775; *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 16 L.Ed.2d 218; 86 S.Ct. 1130. The Court is of the opinion that the evidence upon the record in this case does not establish such clear and unequivocal proof as to warrant the Court in finding that the U.M.W. pursued its policy of uniformity of wage and labor standards by agreement with one or more employers, as distinguished from pursuing such policy upon its own. The only direct evidence in the record is to the effect that the Union pursued such policy upon its own, and not in agreement with any employer" (106a-108a) (265 F. Supp. 411-2).

Thus the Trial Court negated any controlling significance in the case of the majority opinion in *Pennington.*

Also, petitioners relied on proof of the effects and necessary consequences of the course of conduct of UMW and BCOA in designing and applying national contracts in the industry, a factor emphasized by the concurring opinion in *Pennington.*

It is established in the record by UMW's president that 82% of the industry was organized under the national contract (332a). With respect to the industry generally throughout the country in the decade since the 1950 National Contract came into being the Trial Court found:

> "... During the decade between 1949 and 1959, the loss in the share of the market experienced by the large mines (No. 1 mines) in the period just prior to 1949 was reversed and their share of the market increased from 29.3% in 1949 to 49.9% in 1959. Likewise, the profitableness of coal mining appears definitely to have favored the larger producers by 1959. It appears that in 1959 Peabody Coal Company and Consolidation Coal Company, together, realized a net $43,000,000, while the rest of the industry suffered a net loss of $12,500,000" (102a) (265 F.Supp. 409).

The Court also found:

> "Employment in the industry has fallen from 416,000 men in 1950 to approximately 180,000 men in 1959 and to approximately 130,000 men in 1964" (101a).

With respect to the *effect* of the National Bituminous Coal Wage Agreement in the Southeastern Tennessee coalfield the Trial Court made the following findings:

> "Upon review of the evidence as it relates to the Southeastern Tennessee coal field and of the U.M.W.'s activities therein, the following conclusions appear to be clearly supported by the evidence:
>
> "(1) To operate successfully the producers in the Southeastern Tennessee coal field must be able to compete and survive on the T.V.A. coal market.

Since 1954 50% or more of all coal produced in the State of Tennessee has had to find its market with the T.V.A. That figure reached as high as 78% in 1956 and by 1962 was still at 64.3%.

"(2) Due to the geological conditions, the Southeastern Tennessee coal field cannot achieve a level of productivity equivalent to that of its principal competitors on the T.V.A. coal market. This competitive disadvantage is offset in part by the transportation and quality advantages which the field has over its principal competitors in the T.V.A. market at the Widow's Creek steam plant.

"(3) In the period since 1960 the coal operators in the Southeastern Tennessee coal field have been unable to compete and survive in the T.V.A. coal market under the National Bituminous Coal Wage Agreement. While in many instances this appears to have been due to antiquated mining methods and equipment or other causes, the fact nevertheless remains that since 1960 there has not been a single instance of a successful coal mining operation in the Southeastern Tennessee coal field under the National Bituminous Coal Wage Agreement and this in spite of the fact that the only feasible alternative facing most coal operators in the area was to operate under the national contract or go out of business" (146a-147a) (265 F.Supp. 430).

As stated above, the companies in Southeastern Tennessee had signed the National Contract including the 1958 amendment with the Protective Wage Clause. These companies in 1962-1963 tried hard to get UMW to modify the National Contract terms so as to fit all the various methods of operations in the field, ranging from hand mining to the most advanced mechanization, but UMW refused to agree to anything but the flat National Contract terms. The Trial Court found that the failure to reach a working agreement was the rea-

son for the strike starting December 26, 1962, which was still going on at the trial of this case (140a-1a) (265 F.Supp. 427-9). As to this strike, the Trial Court found:

> "The strike, which commenced on December 26, 1962, was accompanied by mass picketing at the road junctions leading to the major mine areas in the field. This strike was still continuing in 1965 at the time that proof was taken for this trial. The U.M.W. has continued support of the strikers by relief payments. Grundy Mining Company (a Tennessee Consolidated subsidiary) did not operate again until October 8, 1963, although it attempted to open in May of 1963 but was prevented from doing so by mass picketing. By February of 1963 all mines on Tennessee Products property had ceased operation due to the strike. No mining on these properties had been resumed by 1965. A great deal of violence, bloodshed and destruction of property had accompanied the strike. Much suffering, deprivation and want has occurred. The Southeastern Tennessee coal field remains a blighted area . . . " (141-2a) (265 F.Supp. 428)

The Trial Court was unable to apply these findings of results of national contracting because of the second footnote of Mr. Justice White's opinion in *Pennington*. The Trial Court declared the opinion of Mr. Justice Douglas (joined in by Justices Black and Clark) was contradictory of that footnote, saying "To hold that a union, in doing what it lawfully is entitled to do thereby creates a prima facie case of illegal activity is a contradiction of terms" (77a) (265 F.Supp. 398).

Turning from the relationships between UMW and the major companies on the national scene, and considering the phase of the petitioners' theory relating to

UMW's ownership of companies competing with petitioners on the TVA market, the Trial Court found that the evidence was insufficient to establish that those companies were bidding on the TVA market with predatory prices. The Court considered that this disposed of that phase of the case without the necessity of considering what part UMW's ownership of those companies might play in determining UMW's intent (assuming intent is important in this case) in shutting down the Southeastern Tennessee field by its demands for impossible labor contracts while its companies walked off with a lion's share of the market on long term contracts. (121a-129a; 265 F.Supp. 419-421).

This whole phase of the case was disposed of with this statement:

> "The Court concludes that the evidence fails to establish that West Kentucky Coal Company or its subsidiary, Nashville Coal Company, engaged in predatory pricing of coal upon the T.V.A. market. It rather appears that West Kentucky and Nashville based their prices upon legitimate business considerations and were attempting at all times to meet competition, rather than lead the market downward. Having so concluded, it becomes unnecessary to consider further the responsibility of the U.M.W., if any, for West Kentucky and Nashville's coal pricing policies." (129a) (265 F.Supp. 422)

The Trial Court considered that the decision of this court in *Gibbs* v. *United Mine Workers*, 383 U.S. 715 meant that every ultimate conclusion of law and fact in a case against a labor union, not just questions as to agency or authorization, must be proved by clear, unequivocal and convincing proof, and the Trial Court concluded that the proof did not manifest a union-

businessmen combination to achieve a predatory anti-competitive end, the Court adding:

> "Did not the clear evidence rule apply, the Court might have reached a different conclusion on certain issues. Likewise, did the prima facie rule, as announced by Justice Douglas in the *Pennington* case apply, a different view of the evidence would have been required" (157a) (265 F.Supp. 434-5).

C. The Opinions of the Court of Appeals

A panel of three judges heard the argument in this case in the Court of Appeals. That panel reversed the judgment in the District Court and remanded the case for a new trial in a two to one decision with a dissenting opinion on April 8, 1969.

UMW filed a petition to rehear in banc. Petitioners were not requested to answer the petition under Rule 40(a), Federal Rules of Appellate Procedure. There was no argument to the Court in banc.

On September 26, 1969, the Court in banc filed two opinions in which the Court was equally divided, four to four. The opinions are prefaced by this statement:

> "After consideration of these appeals by a panel of this court, rehearing en banc was granted. Upon rehearing, the court was evenly divided as to affirmance or reversal of the District Court. Accordingly, the judgment of the District Court stands affirmed."

Judge Edwards, joined by Chief Judge Phillips and Judges Peck and Combs, wrote the opinion favoring UMW. This opinion recited that the Protective Wage Clause of the 1958 Amendment could be construed as

not requiring UMW to impose the contract on the part (18%) of the industry that was not signatory to the national contract. These judges assumed that this made the restraint legal. The opinion does not consider the legality of the restraint clearly expressed at least as to the units (82%) under the national contract with respect to future efforts to modify the terms. The opinion simply says that when the 1950 National Contract amendment of 1958 said, "During the period of this Contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this Contract on any basis other than those specified in this Contract or any applicable District Contract"—this could be construed to be "limited in its effect to its signatories." The opinion points out that in the Second Pennington appeal the Court of Appeals also said, "We agree with the District Judge that the disputed Protective Wage Clause, properly construed, did not require the Union to impose the wages therein contained on the nonsignatory employers."

Petitioners had contended in the Court of Appeals:

> "Even if this contention were correct, we see little difference in result considering the prior history of imposing the national contract which was being amended and the fact that plaintiff-appellants were covered by the national contract and subsequently they were signed up under the 1958 amendment. It was thereafter that these contracts were cancelled (by UMW) and they were unable to get UMW to make any change in the contract terms. UMW simply demanded guarantees of performance." (Brief of Petitioners in Court of Appeals, p. 31)

But there was just no analysis of the legality of the clause as to the units in the organized 82% of the industry, either in the Trial Court or Court of Appeals.

Judge Edwards' opinion goes on to consider the finding of the Trial Court that a preponderance of the evidence showed an implicit agreement by UMW to bargain with *anyone* only on National Contract terms. His opinion says:

> "There is, of course, no doubt that the agreement between the UMW and the BCOA containing the Protective Wage Clause was the action of fully authorized agents. Defendant UMW concedes this and as to this phase of the case, the standard of proof whether 'clear proof' or 'preponderance of the evidence' would make no difference.
>
> "But Judge Wilson found, and we have found, that the language of the agreement did not per se constitute an illegal conspiracy. Plaintiffs also charged, however, that such a conspiracy could be appropriately implied by the District Court from the BCOA-UMW contract, plus the subsequent actions of the UMW officers and members in the organizational and strike activities in the Southeastern Tennessee coalfields and in defendant's purchase of stock in West Kentucky Coal about which plaintiffs-appellants complain. The history and the specific language of the Norris-LaGuardia Act indicate that its 'clear proof' standard was designed to apply to just such charges as these."

What is wrong with this last paragraph is that it does not concentrate on the real question: What part of the record or evidence was it that made the *trier of fact, the trial judge, find* that the preponderance of the evidence proved a straitjacket agreement by UMW? Rather this paragraph suddenly jumps off on

what *plaintiffs charged* in other phases of the case concerning, not the Washington sessions of UMW and BCOA on the national scene, but concerning the conspiracy to take over the TVA market.

The real governing questions at this point would be: Did the trial judge have in mind and did he consider the "actions of the UMW officers and members in the organizational and strike activities in the Southeastern Tennessee coalfields" in finding that a preponderance of evidence showed that UMW and BCOA sitting in Washington had come to a tacit straitjacket understanding for the industry as a whole and on the national level? We think obviously he did not, and we say this because the Trial Court's opinion is divided into very definable and labeled sections and the sections that pertain to this conclusion of the Trial Court indisputably are those labeled "Collective Bargaining Following 1950" and "The Protective Wage Clause" (265 F.Supp. 407-412). The Court made the conclusion stated above concerning preponderance of the evidence at the end of these sections. Then it immediately turned to another subject "apart from the collective bargaining activities of UMW during the decade of the 1950's" and this involved the purchase of stock in West Kentucky Coal Company, etc. So there can be no question of what proof the trial court was weighing in finding there was a preponderance of evidence.

The next question would be: Are there any of the circumstances that he did consider in this part of his opinion upon this question which would call for the "clear-proof" standard any more than the question of whether "the Protective Wage Clause was the action of fully authorized agents" (about which there is agreement in the Court of Appeals that "clear-proof" is

unimportant). Obviously there are no such circumstances because the Trial Court's attention is entirely devoted to the course of bargaining for the national contracts after 1950 through the 1958 contract including the Protective Wage Clause which was in effect in the period of this case, and the Court considered the adverse effects on the smaller or marginal producers and the beneficial effects on the major producers, considering both from an *industrywide* point of view. *There can be no more question that the duly authorized international officers of UMW were in control of this national bargaining and its effects than there can be about who was responsible for the Protective Wage Clause.* The "clear-proof" rule is unimportant to both because there can be no question of "authorization, ratification or participation in" what was going on in the sessions between UMW and BCOA.

The opinion favoring petitioners in the Court of Appeals was written by Judge O'Sullivan, with whom Judges Weick, Celebrezze and McCree joined. This opinion also did not consider the legality of the Protective Wage Clause if it be construed as a restriction on future bargaining only on the organized 82% of the industry. It apparently assumes the legality of such a provision and turns to the findings of the Trial Court concerning "preponderance of evidence."

Judge O'Sullivan said:

> "The question of law which divides us in this case is whether Section 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106, requires that all elements of a cause of action for antitrust violation must be made out by 'clear proof' where a labor union is a defendant, as my brother Edwards holds, or whether the 'clear proof' standard of Section 6

> is limited to the determination of the authority of 'individual officers, members, or agents' to act for a labor union or other organization, as I contend."

He goes on to say:

> "It is clear that had the District Judge considered that the ordinary preponderance of the evidence rule applied, he would have found that the United Mine Workers were guilty of Sherman Act violations."

Judge O'Sullivan points out that there was no question of authorization of the acts complained of in this case:

> ". . . In the case at bar, except as to responsibility for violence, there was no issue as to whether what was done by the Mine Workers' officers or agents had the approval of the union. No such question was raised. The National Bituminous Coal Wage Agreement and the 1958 Protective Wage Clause made between the Bituminous Coal Operations Association and the United Mine Workers were admittedly executed by the proper authorities of the union and Norris-LaGuardia was in no way involved in these critical matters."

Judge O'Sullivan turns to the language of Mr. Justice White's opinion in *Pennington* upon which UMW and Judge Edwards have so strongly relied—"But we think a union forfeits its exemptions from the antitrust laws when it is *clearly shown* that it has agreed . . . ." (381 U.S. at 655; emphasis added). Judge O'Sullivan said:

> "We are not persuaded that the context of Mr. Justice White's use of the words 'clearly shown' in the sentence quoted justifies their being read as announcing a new rule giving labor unions special

treatment in defendant suits under the Sherman Act. The concurring opinion of Mr. Justice Douglas, joined by Mr. Justice Black and Mr. Justice Clark, does not even discuss the subject. Neither does Mr. Justice Goldberg, who was joined by Mr. Justice Harlan and Mr. Justice Stewart in dissenting from *Pennington* II.

"That the words 'clearly shown' were not employed by Justice White to announce the rule claimed by Judge Taylor in *Pennington* II and by Judge Wilson in this case is made clear by the fact that neither in Justice White's opinion nor in any of the others in *Pennington* II is Section 6 of Norris-LaGuardia even mentioned. It is that statute which is the sole basis for the claim that 'clear proof' is the standard applicable to the burden of proving all elements of a labor union's violation of the Sherman Act.

" . . . The 'clear proof' rule was created by Congressional Act, with clear definition of its limited application. We are not at liberty to do violence to its plain language by reading into it new and special antitrust insulation of labor unions not contained in the exemption granted them by the Clayton Act. Certainly the *Gibbs* case did not do so, and so we are not persuaded that two words included in a general observation by one of the Justices in *Pennington* II did so."

Judge O'Sullivan then turned to the broader charges of conspiracy having to do with the competition for the TVA market and union investments in, and financial assistance to, major companies competing with petitioners for, and quadrupling their share in that market, and his opinion says:

"There is nothing in the record of this case to suggest that the conception and prosecution of the grand plan we deal with was the work of irre-

sponsible underlings. The total enterprise was directed from high echelons of authority. Top people of the United Mine Workers and the Bituminous Coal Operators Association did not need the protection of Norris-LaGuardia when they negotiated and signed the National Bituminous Coal Wage Agreement and its Protective Wage Clause, nor when the Mine Workers invested $25,000,000 to aid the big coal companies to fulfill the promise of the plan.

"Peace has indeed come to Southeastern Tennessee's part of Appalachia, but it is the peace of obedience to the overlords of big business and big labor."

D. Statement of Facts

Petitioners believe that most of the important facts are contained in the Trial Court's opinion and in our summary of that opinion above. There are many recitals of fact by the Trial Court that find no disagreement between the parties. For this reason much of the trial record was left out in the printing of the appendices in the Court of Appeals, which appendices come to this Court as the stipulated record. We believe the errors below are the result of erroneous views of the law.

However there are some areas of factual disagreement, and for this reason it becomes necessary to present a general summary of some of the proof, both on the national relationships as well as on the Southeastern Tennessee scene.

1. UMW DID NOT HAVE A CONSISTENT WAGE UNIFORMITY POLICY BEFORE THE ORGANIZATION OF BCOA IN 1950; DIFFERENTIALS GAVE RECOGNITION TO ALL SEGMENTS OF THE INDUSTRY IN COLLECTIVE BARGAINING; UNIFORMITY MADE NO SIZABLE GAINS UNTIL THE HEAVY DEMANDS OF THE WORLD WAR II PERIOD. DECLINE IN DEMAND IN THE POSTWAR PERIOD LEFT THE ALTERNATIVES OF RETENTION OF SUBSTANTIAL DIFFERENTIALS, A PRODUCTION CONTROL PLAN, OR SURRENDERING THE INDUSTRY TO THE MAJOR COMPANIES WITH WAGE UNIFORMITY.

The central point in UMW's defense is that its policy of seeking uniform wages is unilaterally established, not pursuant to agreement with any outside group, but as a tradition traceable to UMW's origin in 1890. UMW says it made no change in policies after BCOA (Bituminous Coal Operators Association) was established in 1950, but only followed earlier policies.

The error in this sort of conclusion and the fact that UMW is leaving something out are manifest in the fact that it was not until the heavy war demands for coal in the 1940's that any appreciable change was made in the patchwork of wage differentials that existed since the union's origin a half a century before—a patchwork that belies any assertion that uniformity was an influential policy until that time.

The actual practices and contracts of the union lead to the unavoidable conclusion that before 1950 there were other historic policies that were deeper and more compelling. These were the policy of the union to represent *all* and not just a small part of its members with the accompanying policy of seeking equality of working opportunities for *all* of the members. There was the companion policy of recognizing the need for competitive equality. The position of petitioners is that these policies were strong and effective in the union

until after the union started negotiating national contracts with the newly formed BCOA.

It was only by the surrender of these traditional and natural concerns and truly responsible policies, that the union could release the brakes and plunge headlong down the road of pure and complete uniformity—the road that has benefited such companies as Consol (Consolidation Coal Company, the largest company, which set up BCOA) so very much and has been so disastrous to the lesser companies and to the great majority of union members who found there were no terms allowed which were practical in the places and conditions where they found themselves.

So we turn to the actual record rather than defendants' present analysis about the really controlling UMW concerns before 1950.

The most reliable part of the record on this subject would be the analysis of official records of the union by a UMW witness, Joseph P. Brennan, Assistant Director of UMW's Research Department. He testified from the reports of officers and from convention minutes, and the nature of his findings were not a consistent policy and pattern of pure wage uniformity. Rather he reported on such efforts as these: "to formulate a uniform day work scale, based upon the districts upon which the mining prices are based" (1899 Convention, 737a). (This was the same sort of program in effect as late as the NRA Codes and Guffey Act days of 1940 with all differential questions being resolved on the basis of competitive equality in a changing industry—90a-91a; 593a-594a; 646a-647a).

Brennan also reported on a policy for uniformity for the same type of labor and this uniformity was to be

in the Central Competitive Field, with equitable differentials in the outlying fields. (1914 Convention—740a-741a). The 1927-1932 period dealt mostly with wage reductions, but the 1932 Convention dealt with the proposition that if wages were "uniformly raised to the standard of three years ago and the employers of labor would occupy towards each other the same relative position in point of competition as at present" such an advance would be beneficial (744a).

The 1934, 1936 and 1938 conventions were greatly concerned about "inequitable differentials—the subject in mind being more or less correlated to the question of freight rates and prices" (746a), and concern for "a more equitable competitive relationship" (748a), "Due consideration being given in each situation to what the establishment of a just, equitable differential might mean not only to the industry itself, but in working opportunities to the men dependent upon the industry" (748a-749a).

The report of UMW officers to the union convention of 1936 stated that the introduction of new machinery by the larger and richer companies was causing "a deadly competitive situation for coal operators who may be less fortunately situated" and also "a grave problem for the United Mine Workers of America" (1045a-1046a).

The report of the officers to the convention of 1938 stated that the purpose of UMW was to make rates equitable inside of and between districts and attain "a parity in competitive conditions" to allow the producers "their fair share of the markets" and afford all members "equal work opportunities" (1047a).

When UMW say that historically UMW has never opposed mechanization, this is an implication that

petitioners' theory is that UMW suddenly stopped opposing mechanization in 1950. This is a subtle revamping of our case to cause our theory to look somewhat unreasonable and to avoid discussing the real change which is so clear on the record. No union could officially oppose mechanization or any other kind of progress without outcrys of "feather-bedding" and strong public reaction. And we did not contend that UMW opposed mechanization before 1950 and stopped doing it after 1950.

What we did say is that before 1950 UMW had a much discussed policy of seeking to preserve working opportunities for all of its members—not just those who worked for a big mechanized mine. And the union permitted differentials to stand if needed to keep men in jobs. Its primary concern before the 1950 contract was the growing disparity in work opportunity among its members. As will be developed on the next pages, this was the dominant theme in UMW records in the late 1940's. The union's policy then was to spread the work to everybody. But UMW ignores this. The union witnesses denied actual union records produced by the union witness Brennan. We think this was important in this case. But the Trial Court had to give full credence to these denials in order to give substance to any findings in favor of UMW. (See 94a)

Before 1950, in the 1948 union convention, Mr. John Lewis told the delegates:

> "The productive capacity of our coal industry exceeds at any normal time the consuming capacity of our markets. For many long years the coal industry was developed to a degree that the worktime of the industry was intermittent, and in the majority of coal-producing states was almost

chronically under 200 days per year work-time opportunities.

* * *

"The Mine Workers had a bitter experience in that matter and we have taken some profit from it. In the anthracite industry we made it an issue, and due solely to pressure from our organization and the policies which we suggested we were finally able in the anthracite region, covering Districts 1, 7 and 9, to put into effect a joint commission consisting of representatives of the operators, representatives of the three districts of the United Mine Workers, and representatives of the State of Pennsylvania, to allocate the work-time for the anthracite industry, so that such work-time as was available would be shared by all our members in as substantially equitable a manner as could be made effective.

"This arrangement has proven to be a great stabilizing influence in the anthracite industry.

* * *

"I merely want to say this in connection with this matter. When this market condition comes to a point in the bituminous industry that it threatens the stability of our contract and the working conditions of our people, when the disparity in employment gets to a point where it constitutes a rank injustice and lack of opportunities for our members to work, the United Mine Workers of America itself may find it necessary to advise our members how many days a week they need to work. We have that contractual right, because the contracts are written to permit that. It is a matter of self-preservation for the investors in the industry. If the operators of this country can't give any leadership on the commercial side of this industry, the United Mine Workers of America can and will.

> "So next year, in 1949 or at any other time, when evil days come upon this industry, you will find the United Mine Workers of America moving in, and if there are only three days work in this industry we will all have the three days work." (258a-261a)

In 1949 evil days did come on and the union started the three day week (249a; 614a). Concerning this the official journal of the union reported that this was a stabilizing stoppage to prevent the "big companies from hogging the market"; that the duty of the union was to stabilize since the industry did not have the leadership; that there must be "divide-the-orders, share-the-work program." (272a-274a)

In the first pre-trial deposition in the first case on the subject, *First Pennington*, Mr. Lewis testified the three day week related to only one thing, and had nothing to do with any other subject, and that was "the equitable distribution of work opportunity" (262a). And he further testified this was the sole reason UMW set three-day weeks (262a; 272a).

At the first bargaining conference with the northern operators in 1949 Mr. Lewis proposed that the bituminous industry adopt a production control plan like the one in operation and sponsored by the union in the anthracite industry. The minutes of that meeting show he said:

> "The Mine Workers have gazed at some degree with admitted apprehension at the tendency of the industry to reduce their prices in the face of increasing competition. Frankly we think the industry has been too hasty . . . .
>
> "There has been much talk lately about a stabilization plan, much of it is affecting the Mine

Workers and the operators. It has no basis of fact and cannot be considered practicable. It is true, however, that we do have a segment of the coal industry operating under a plan that brings about a distribution of working opportunities. (Mr. Lewis then explained the plan that had been worked out in the anthracite industry.) We would like to talk to you in this conference on some improvements and stabilization which is a question of magnitude in the minds of the men as affecting the investment in the industry" (265a-267a).

In later testimony the union witnesses have sought to deny and blot out all this record (614a-615a; 689a; but contrast President Boyle at 517a-526a).

We submit the far more reliable actual records and testimony show rather clearly there were discussions going on in this period involving industry and union leaders and dealing with the subject of industry stabilization, a significant fact in view of the big change that emerged when BCOA was formed in 1950.

The change in the policy of the representatives of the major companies that occurred in 1950 is also clear. Mr. George Love, head of Consol, as principal industry representative in negotiating with UMW before 1950, was likewise confronted with conflicting policies, just as the union was. He testified about these—the desire and purpose that his company's wage costs not be higher than his competitors regardless of the conditions in which they operated—a policy consistent with and parallel to the UMW's policy of seeking uniformity as far as equitable. Then the conflicting policy of recognizing the interests of hundreds of smaller coal companies who had their backs to the wall as Mr. Love said back then—a policy of responsible concern for those who were dependent upon the negotiations but

whose conditions would not permit them to keep pace with Consol on wage costs. (See his testimony at 398a-400a; 833a-835a).

So the chief spokesman for the industry, the head of Consol, was concerned that the union contract be applied to all competitors, that those competitors' wage terms be the same as his, but up to this point there was a feeling of fiduciary responsibility to keep those costs down so that they would not rise to the level where Consol could pay them but these hundreds of smaller companies could not.

The case for UMW must ignore this actual history and play up the denials of UMW witnesses which are completely unrelated to the actual record. We submit this actual record established that there was not a history of pure wage uniformity policy in the industry pursued by UMW alone from 1890 to this day, but rather that the union's previous prime concern was for equal working opportunity for all members and competitive equality for producers. Then there was a crisis with the drop off in demand in the post war years, particularly in 1949-50, and that this crisis presented three alternatives to UMW: (1) Restore the pattern of wage differentials that was weakened when the heavy demands of the war permitted all segments of the industry to pay the series of wage increases that occurred in that period (see 602a). (2) Inaugurate a production control plan like that UMW had sponsored in anthracite as suggested by Lewis to the 1949 conference. (3) Let the major companies pay the same wage costs as lesser companies in accordance with the purposes expressed by Mr. Love above, but with the sure knowledge, just as Mr. Love indicated, that "these hundreds of other operators" would be destroyed.

Later events disclose reliably that the third alternative was chosen, in concert with the newly formed BCOA.

2. THE REASON WHY THE DIFFERENTIALS IN WAGES BEFORE THE 1940's WERE FAIR AND THE FLAT INCREASES ACROSS THE BOARD SINCE 1949 ARE UNFAIR: THE OBVIOUS MECHANICS OF COMPLETE ECONOMIC REGULATION OF THE INDUSTRY BY CONTROL OF WAGE POLICY IN AN INDUSTRY LIKE COAL.

The Supreme Court said in *First Pennington* at 381 U.S. 668:

> "One could hardly contend, for example, that one group of employers could lawfully demand that the union impose on other employers wages that were significantly higher than those paid by the requesting employers, *or a system of computing wages that, because of differences in methods of production, would be more costly to one set of employers than to another. The anticompetitive potential of such a combination is obvious,* but is little more severe than what is alleged to have been the purpose and effect of the conspiracy in this case to establish wages at a level that marginal producers could not pay so that they would be driven from the industry." (Emphasis added.)

First Pennington dealt with a marginal producer, but this case concerns the killing effect of a combination upon all sorts of companies in one of the older coal fields of the country. Coal fields have wide differences in geology with consequent differences in production methods that are absolutely unavoidable. The relative use of manpower as against the use of machines varies enormously.

The thick and clean seams of coal are held in the reserves of the larger companies, and the land afford-

ing good operating conditions available for the rest of the industry is at a premium (311a; 384a; 377a-381a).

In areas traditionally and economically tied to the coal industry where the more ideal seams are exhausted or lie idle in the reserves of large companies, there is usually an abundance of smaller seams. But the manpower and the machinery cannot be nearly as productive in those seams.

In addition, some coal areas have peculiar marketing problems, as in Southeastern Tennessee which, as shown above, has become tied to the TVA market.

Whole communities, whole areas of the country, for many decades have been dependent upon all these varying conditions of mining and marketing. So when a combination moves in to say that everybody will conform to a contract tailored to fit the constantly improving techniques used by those in the most favored conditions, that combination is condemning to "blight" (see the Opinion of the Trial Court, 265 F.Supp. 428), and death the economy of whole regions and sentencing the population of those areas to unemployment. This is exactly what has happened to a great part of the regions of the coal industry, while other regions of the industry never had it so good. This is why the older system of differentials was fair. This is why the system of flat, blanket, across the board, wage increases constantly applied is so unfair, and why it becomes more and more unfair the higher it gets.

This is why there has been a mechanical revolution in coal with a fantastic increase in productivity per man per day with a consistent enormous drop in numbers of jobs and mass unemployment (425a-429a; 848a-849a; 1123a).

No other industry, we dare say, is comparable in this regard—certainly not steel, or automobiles, or glass—industries which UMW constantly points to as having kept pace with coal in wage increases. But not even with respect to these other industries, in making comparison to coal, does UMW dare to make a comparison that would include welfare fringe benefits, weighing on coal's side the 40 cents per ton welfare royalty that has, after all the wage increases, been the difference for a lot of the companies in the medium category.

On top of that these other industries do not have "national contracts" but still have bargaining company by company.

These things are obvious today. We submit they were obvious back in 1950 when the representatives of the major coal companies clearly established a combination with UMW that has controlled wage policy since then.

3. SINCE BCOA WAS FORMED IN 1950, UMW HAS WORKED IN CONCERT WITH THE PURPOSE OF CONSOL TO HAVE THE NATIONAL CONTRACT TERMS, INCLUDING REPEATED FLAT INCREASES, APPLIED TO ALL COMPANIES.

The 1940's were turbulent years for the coal industry (232a-245a). The years of crises after the war, and the mixed concerns referred to above, on the side both of the union and the industry leaders, resulted in no peace until the 1950 contract terms were settled March 3, 1950.

In the previous bargaining conferences in which UMW had negotiated terms with the northern conference, the Southern Coal Producers Association and the "captive" mines, there were open meetings with board representation and every segment of the industry found a voice.

Following the signing of the National Bituminous Coal Wage Agreement of 1950 the Bituminous Coal Operators Association was formed on July 22, 1950, resulting from discussions between Mr. Harry Moses and Mr. Love that had commenced in 1949 (254a; 432a; 817a-818a).

It was Mr. Love of Consol, as related above, who wanted competitors to pay wages no lower than his if he could do anything about it. Representing the largest company and being the spokesman for the northern industry in labor matters, he was in a position to do something about it and he proceeded to do just that.

Love and his colleagues decided they would try to get the negotiations out of the public view and into private sessions. This was a decision of the industry leaders, not the union (609a; 625a-627a).

In fact, to show UMW was not connected with this change UMW's chief counsel, whose testimony was read, stated that there was discussion in the press from industry leaders "that a tsar in the industry was going to be in the bituminous industry, was going to be selected by the operators and there was all sorts of speculation in reference to it in June of '49 and the union publicly disclaimed connection with this movement" (990a). However, it is true that Lewis had said shortly before: "If the operators of this country can't give any leadership on the commercial side of this industry, the United Mine Workers of America can and will" (261a). And it is true that when BCOA was established UMW did readily enter into "quiet" and private negotiations with BCOA for contracts that did, in fact, cover the entire industry.

BCOA was an association that included about half of the industry tonnage and some of the largest commercial and steel captive companies (254a). The largest companies, including Consolidation Coal Company, had close contact with the negotiating sessions of BCOA with the union (480a; 621a).

With respect to the formation of this association and its subsequent relationships with the United Mine Workers of America, Mr. Harry Moses made the following observations in 1955, which were quoted in the United Mine Workers Journal: The history of labor-management relations in the bituminous coal industry is underlined by a "quest for stability." He stated that the "chaos out of which grew the current chapter of coal's stability had its beginnings in the breakdown of the famous Jacksonville agreement of 1924." He stated that unfair competition from non-union southern coal companies was what caused the breakdown of that agreement. He referred to the destructive competition of the 1920's and the subsequent legislation in the form of the NRA Code and the Guffey Acts, and the period of intense conflict between the industry and the union until 1949. He said that all of this led to a small group of operators getting together in 1949 "to do some long-range thinking," and that "responsible segments of the industry decided to remove their collective bargaining out from under the 'Kleiglights' into the realm of fact and reason." The mechanism for this new procedure was to be the Bituminous Coal Operators Association of which he was the head. Mr. Moses said that the new mechanism is for him and President Lewis of the union, both with instructions from their members, to get right down to bargaining and by-pass the old fruitless joint-wage

conferences. He further stated that the new bargaining machinery has established "clear-cut lines of negotiating authority and had made possible the negotiation of *national* agreements with far less confusion, far less expenditure of the time and energy of business executives and far less undesirable publicity for the industry." He said that the establishment of BCOA "has made possible swift and *effective handling of national problems, on an authoritative basis.*" He stated that "perfect stability is an attainable goal and that the coal industry has taken long steps in that direction" (431a-434a).

The union witnesses have praised the emergence of BCOA: ". . . it is a wonderful policy if two segments of our industry, whether it be coal, whether it be automobiles or anything else, can devise within the industry a group that can speak *authoritatively* . . ." (627a).

In October, 1950, an international organizing committee was set up by the international executive board of UMW to promote an intensified and integrated organizing campaign in the non-union areas of the bituminous coal industry (319a-321a). Eighty-two per cent of the industry was organized (332a).

The National Bituminous Coal Wage Agreement of 1950, as it was amended from time to time by negotiations between UMW and BCOA, was the only form of contract that UMW had to offer any other bargaining unit in the industry. While, as seen below, some UMW field representatives allowed mines violating the contract to stay in operation under special deals with the men to give employment, not a single change from the national contracts of BCOA-UMW

have been authorized in the industry since 1950 (315a; 535a-540a; 669a). The Districts of the United Mine Workers received the printed form of the National Bituminous Coal Wage Agreement from the International Union as amendments were negotiated with BCOA, and it was the responsibility of the District organizers to go out and get signatures on these forms. The District, the District organizers and the Local unions had no authority to make any changes in the language contained in these forms (181a).

4. UNDER BCOA A NEW BARGAINING TECHNIQUE WAS FORMED; TWO MAN BARGAINING TEAMS WORKED OUT A SERIES OF FLAT, ACROSS THE BOARD WAGE INCREASES; THE OTHER BARGAINING UNITS LOST THEIR FREEDOM AND BECAME AUTOMATICALLY SUBJECT TO THE BCOA CONTRACTS.

The desired retreat from the publicity of the conferences before 1950 was accomplished under BCOA and the "quiet" or "mystery" bargaining became the order of the day (1016a-1017a; 432a; 609a; 625a-627a).

In the period after 1950 when BCOA and UMW were working together, the 1951 amendment to the National Bituminous Coal Wage Agreement of 1950 was executed between UMW and BCOA five months before the expiration of the 1950 contract. Mr. Lewis had conferences with Mr. Moses and finally in Mr. Lewis' handwriting the suggestions for the contract terms were given Mr. Moses, who made a copy of them and handed the copy to Mr. Lewis and retained those in Mr. Lewis' handwriting. These suggestions resulted in the consummation of the National Bituminous Coal Wage Agreement of 1950, as amended January 18, 1951. This amendment provided for an increase of $1.60 per day in wages across the board (296a; 301a).

On July 22, 1952, UMW entered into negotiations with BCOA for a new contract and at the meetings between Mr. Moses and Mr. Lewis, the National Bituminous Coal Wage Agreement of 1950 was amended, the 1952 amendment increasing the wage by $1.90 per day across the board and increasing the Welfare Fund payments from 30 cents to 40 cents per ton. The amendment also added the so-called "Land-Lease" clause (297a; 301a; 353a).

The negotiators for the foregoing two amendments were made up of one man from the BCOA in the person of Mr. Harry Moses and one man from UMW in the person of President Lewis. Vice President Thomas Kennedy, of UMW, in the 1956 Convention, characterized this as a "new technique in collective bargaining—a two-man bargaining team" (298a).

By the "Land-Lease" clause inserted in the 1952 amendment the signatory operators agreed that the contract covered "the operation of all lands owned or held under lease by them or any of them or by any subsidiary or affiliate at the date of this agreement, or acquired during its term which may hereafter during the term of this agreement be put into production". This gave UMW a great amount of control over the leasing of coal lands as to what leases would be permitted, and UMW exercised this control in private sessions with the lessors (353a; 414a-419a).

The 1955 amendment to the national contract was negotiated in the same manner as the previous two amendments. The 1955 amendment increased the wages across the board by a two-step increase, or a total of $2.00 per day, and it raised vacation pay from $100.00 to $140.00 (298a; 301a).

Mr. Harry Moses died after the 1955 amendment and Mr. Edward J. Fox, President of Philadelphia & Reading Coal and Iron Company, in the anthracite region, became the Chairman of the Bituminous Coal Operators Association. In 1956, in the early part of August, UMW sounded out, through Mr. Fox, whether or not the coal operators represented by his organization, were going to follow the same pattern in the making of the contract as followed by Harry Moses. Word was received back that they did want to follow that course. The 1956 amendment provided for another two-step increase, with a total increase across the board of $2.00 per day. Vacation pay was increased to $180.00 with an additional $40.00 for Christmas (298a-302a).

After BCOA signed the 1951, 1952, 1955 and 1956 contracts, the contracts were presented to the other associations outside of BCOA and the other companies that did not belong to the associations (181a; 315a; 669a). These associations and companies had no real freedom of action for collective bargaining, although they did have the right to accept or reject the national contract. UMW introduced the witness Hamilton Beebe, Secretary of Illinois Coal Operators Association. He testified that the Illinois Coal Operators Association had belonged to BCOA when the 1952 contract was negotiated by Mr. Moses but the Illinois Association withdrew thereafter in order to obtain greater freedom of action; but in the subsequent negotiations, according to Mr. Beebe, the UMW witness, the companies of the Association did not obtain any freedom of action but only the right to accept or reject the one contract (865a-877a).

5. A MECHANICAL REVOLUTION OCCURRED AFTER 1950. UNEMPLOYMENT WAS RAMPANT.

The production of the industry declined from approximately 516,000,000 tons in 1950 to approximately 412,000,000 tons in 1959. (Thereafter the production increased and by 1964 it was at the 487,000,000 ton level.) The average number of men employed in the industry daily has fallen at a far more rapid rate. In 1950 there were approximately 416,000 men employed and in 1959 there were approximately 180,000 men. This is attributed to mechanization and increased productivity required by the flat wage increases across the board. In 1920 the underground production averaged 3.97 tons per man per day. In 1949 it was still only 5.42 tons. But by 1963 it was 12.78 tons. This does not include surface mining which shows much higher figures (1043a; 1123a).

The resulting unemployment and economic demoralization of coal producing areas have been matters of serious public concern (425a-429a; 848a-850a).

6. UMW AND BCOA ARE INTENTIONALLY FORCING THE REPLACEMENT OF MEN WITH MACHINES. IN CONTRAST TO ITS ATTITUDE BEFORE BCOA, AFTER 1950 UMW APPROVED THE ELIMINATION OF THE UNITS WHICH OPERATED IN CONDITIONS WHERE THEY COULD NOT KEEP PACE WITH THE CONTRACT AND THE MECHANICAL RACE. THE DEMAND FOR THE PWC RESTRAINT BY THE MAJOR ASSOCIATIONS.

After 1950 Mr. Lewis acknowledged that the contracts were tailored to fit the use of the latest machinery (303a-305a).

Mr. Lewis stated in the UMW Journal after 1950:

> "We have got many units of our industry that aren't modern, with low productivity and obsolete machinery, not well financed, no marketing outlet, mining a poor grade of coal, and with in-

efficient management. *They are just a drag on the industry.* The constant tendency in this country is going to be for the concentration of production into fewer units, with the best possible equipment, under the most modern plans that our engineers can devise, with less idle day loss, because the more continuous operation is geared to standard, qualified marketing outlets and practices. That is the tendency. More of the obsolete units will fall by the board and go out of production." (311a)

Lewis acknowledged that combines were being formed in the industry through mergers and these had their advantages and were able to save money in a number of phases of operation (307a).

On being asked as to whether the union had any concern as to the smaller units of production being able to pay the increased costs of the National Bituminous Coal Wage Agreement, Mr. Lewis replied that "the industry, being one that notoriously is over developed, with a production capacity far in excess of the economic requirements, the union, like all other elements, is bound by the conditions that exist, and cannot guarantee, and, in fact, cannot afford to undertake to become the sponsor and the protector of thousands of inefficient and ill operated, uneconomic minings units" (316a). He further stated that there are hundreds of concerns that go into bankruptcy each week in this country and "so it is with these pallid, underfed, ill nourished operators of small coal mines, who cannot keep up with the economic procession nor live under the rules of competition as it now exists in this free enterprise nation" (309a).

Also in contrast to the previous constant effort of the union to attain equality as far as practicable is

the present attitude that such a policy would be a waste of time. Secretary-Treasurer Owens testified that it would be ridiculous to try to negotiate a wage rate that would "give all of them an opportunity to market their coal on an equality with one another, it is ridiculous" (605a). And President Boyle complains about the extra work and time in having to sit down and talk with all these other units, "but you do sit down and you do negotiate" but, of course, nothing has ever been accomplished in one of these sittings since 1950 (506a; 545a-546a).

This "forcing" of machines upon the whole industry by UMW-BCOA *has* had its toll in the less favored coal areas with economic blight for the communities of displaced miners, degradation, despair, evacuation of the younger generations (425a-429a; 848a-850a).

Two-thirds of the men lost their place in the industry. Some would not accept the fate meted out by UMW-BCOA and took jobs in non-union mines or mines that did not comply with national contract terms. Then there came the PWC. This involved not only BCOA but also the other two major operator associations.

UMW's witness H. W. Beebe testified that sometime before the PWC was signed Joseph Moody, head of Southern Coal Producers Association (SCPA) was conferring with Mr. Beebe of the Illinois Association about the PWC (883a-884a). Mr. Hopkins, UMW general counsel, also testified that at the same time Mr. Fox of BCOA and Mr. Kennedy of UMW were exchanging drafts of a proposed PWC (942a-944a). He testified that the operators demanded paragraph A of the PWC (1016a-1018a; 1021a; 1028a-1029a).

There is no dispute in this case that these men (Lewis and Kennedy of UMW, Fox of BCOA, Moody of SCPA and Beebe of the Illinois Association) were working together in drafting this clause to be inserted in the national contract. These men, plus Mr. Owens, Secretary-Treasurer of UMW later became the members of the joint committee (JICC) that policed the industry in the observance of this clause (878a; 881a; 1018a).

7. THE 1958 PWC; WHAT IT SAYS.

The PWC is set forth in the appendix (1105a-1111a).

It is to be observed that in the introductory paragraph of PWC all of UMW's local agents, including the field representatives were included in the definition of "United Mine Workers of America," and this paragraph expressly binds the union to exercise all possible efforts and means to attain the objective of having the national contract terms observed in all bituminous coal mines. Thus UMW *did* make the "strait-jacket" commitment in this paragraph as well as in Paragraph A. The introductory paragraph reads:

> "The United Mine Workers of America (which, as used in this Clause, includes all of its Districts, Local Unions, Officers or Agents) and the Operators signatory hereto affirm their intention to maintain the integrity of this contract in all of its parts. The objective of this contract is to provide the maximum possible continuity and stability of employment under the conditions set forth herein. The parties hereto agree that bituminous coal mines shall be so operated as not to debase or lower the standards of wages, hours,

safety requirements and other conditions of work established by this contract. The parties recognizing their obligation each as to the other to exercise all possible efforts and means to attain these objectives further agree as follows."

It is to be borne in mind that this provision amended the 1950 National Bituminous Coal Wage Agreement and UMW and the associations, in working up this clause in 1958, were fixing in writing the express duties of UMW with respect to the 1950 National Contract.

Paragraph A, which was demanded by the association, reads:

> "During the period of this contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this contract on any basis other than those specified in this contract or any applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto."

Paragraph B of the PWC required signatory operators to boycott coal produced without compliance with the national contract.

Paragraphs C and E of the PWC established a "Joint Industry Contract Committee" (JICC) to act as a tribunal to try UMW or any operator for violations of the duties contained in the PWC.

Paragraph D required UMW to report "complete" lists to the JICC of the names of "all" of the op-

erators "whose operations are under contract with the union." A signatory operator was not subject to trial for buying or dealing in coal produced by any operator on this list reported by the union unless that operator had previously been found not in compliance with the national contract.

Paragraph E required UMW to make available to the JICC "all contracts, agreements, or understandings entered into by the Mine Workers with any person engaged in the production of bituminous coal" and to make its appearance before the JICC on request in case of investigation of alleged violations of the PWC.

8. EFFECTS OF THE NATIONAL CONTRACTS: LOSSES TO THE INDUSTRY AS A WHOLE; PROSPERITY TO MAJOR COMPANIES.

We have commented above on the drastic unemployment and economic decline in many coal-producing areas. It remains to mention the effect of a decade of these national contracts on the industry itself.

As found by the Trial Court (102a) during the decade between 1949 and 1959, the loss in the share of the market experienced by the large mines (No. 1 mines) in the period just prior tc 1949 was reversed and their share of the market increased from 29.3% in 1949 to 49.9% in 1959 and 54.9 in 1964 (1117a-1118a). Likewise, the profitableness of coal mining appears definitely to have favored the larger producers by 1959. It appears that in 1959 Peabody Coal Company and Consolidation Coal Company, together, realized a net $43,000,000, while the rest of the combined corporate industry suffered a net loss of $12,-500,000" (102a; 840a-845a; 1042a).

9. THE IMPACT OF THE CONSPIRACY ON SOUTHEASTERN TENNESSEE.

(a) Summary of the Development in the Southeastern Tennessee Coalfield.

As the Trial Court points out in its opinion (81a-87a), most of the petitioners in this case are truck mine companies, principally operating upon lands held by Tennessee Products and Chemical Corporation or Tennessee Consolidated Coal Company. These truck mines belonging to these petitioners were among a large number of such truck mines that mined coal under leases from Tennessee Products or Tennessee Consolidated and sold coal on contracts obtained by those two companies, principally contracts with TVA. Other petitioners operated on property in other areas of the field.

The Southeastern Tennessee coalfield occupies three counties in the southeastern part of the state (131a). The characteristics of the seam of coal mined in this area is described by the Trial Court as follows:

> "The seam of coal in the Southeastern Tennessee coal field, called the Sewanee seam, is located in a mountainous area of the State at an elevation of approximately 1800 feet. It is a rather high grade metallurgical coal. That is, it is usable for making coke for metallurgical purposes. However, the field has certain geological disadvantages. The principal of these is the thinness of the seam. The average thickness of the Sewanee seam appears to vary from 36 to 42 inches, but the seam is highly irregular in this respect. The seam is subject to squeezes and rolls in a very irregular and unpredictable manner; that is, the thickness of the seam varies and these conditions have no pattern. The seam may in one place be squeezed to a matter of a few inches in thickness

or may be entirely pinched out by rock. In other places the coal may be rolled into a thickness up to six feet. Hazardous roof conditions are often encountered, especially in the areas of the rolls. The topography of the area is largely mountainous. Accordingly, most mining must be done underground, and the field does not lend itself to strip mining due to excessive overburden except in limited areas.

"These geological conditions place the Southeastern Tennessee coal field at a disadvantage with many other coal fields. For example, whereas only 32% of the coal produced in Tennessee is produced from seams over four feet thick, 65% of the coal comes from seams over four feet thick in the United States as a whole. The irregular nature of the seam, its thinness and difficult roof conditions all pose problems for mechanization" (132a-133a).

The Court's opinion (133a) points out that UMW represented the great majority of the miners of the Southeastern Tennessee field, and petitioners signed the National Bituminous Coal Wage Agreement of 1950 and the subsequent amendments thereto that were made by UMW and BCOA. The Trial Court points out (134a) that the truck mine operators in the field, which would include petitioners except Tennessee Products and Chemical Corporation, failed to comply with the National contract. With respect to the period after 1950, the Court says:

"However, the practice of noncompliance with the contract terms was widespread among the truck mine operators. There was substantial evidence in the record that the UMW, through its field representatives, knew of the failure of the truck mine operators to pay the union scale and to pay the

full Welfare royalty, but that they instructed the operators to do 'the best they could' to satisfy the miners and keep the mines working'' (134a).

Then, in 1955, Whitwell Coal Company obtained a substantial two-year TVA contract, awarded at the Colbert plant, the coal to come from truck mines on Tennessee Consolidated property (443a, 447a). The events that ensued in the Southeastern Tennessee field, as indicated in the Trial Court's opinion, followed a parallel course for the truck mine operators throughout the field. The events may be illustrated by following developments with respect to the truck mines on the property of Tennessee Consolidated.

The award of the TVA contract to Whitwell Coal Company for the truck mines on Tennessee Consolidated property in 1955 and the award of earlier contracts in 1954 to upper East Tennessee and Kentucky producers were followed by articles in the United Mine Workers Journal, distributed to all members of the union, attacking the TVA for awarding these contracts (429a-430a, 441-443a, 1040a-1041a).

At the ensuing bid openings of TVA, the successful bids for the Colbert Plant came from a number of the major companies of the West Kentucky coalfield, including West Kentucky Coal Company and Nashville Coal Company, and these bids were all at identical evaluations, to the exact hundredths of a cent per million BTU cost, for delivery at the Colbert Plant (443a-444a).

As the Trial Court points out, after the Whitwell contract was awarded by TVA, there ensued a period of work stoppage in the Southeastern Tennessee field principally brought about by the efforts of UMW

District officers demanding that Tennessee Products and Tennessee Consolidated collect the 40 cents per ton Welfare Fund royalty under the National contract from the truck mine operators through withholding such amounts from payments for coal (134a, 444a-450a). This was settled by the obtaining of authorizations from the truck mine operators allowing this deduction to be made, the funds to be forwarded to the Welfare Fund. This withholding of Welfare Fund money was to apply only with respect to contracts for the sale of coal made after that time because the District officer of the union knew that the truck mine operators could not stand to pay the 40 cents under the existing contracts (134a, 447a-448a).

During the balance of the two-year term of the Whitwell 1955 TVA contract there were frequent interruptions in work. A large part of the tonnage under that contract was lost by the truck mine operators because of these interruptions and the contract finally expired in March of 1957 (135a, 449a-452a).

With the 40 cents per ton added into the computation of bids for new coal business, there ensued a period of almost two years during which bid after bid was filed with the TVA but the prices were too high to obtain business for the truck mines (454a-459a). During this period there was little work for the truck mines and the devastating unemployment that arose during this period of time resulted in studies of the unemployment problem in the coalfields by the State of Tennessee, particularly in the Southern Tennessee area (425a-429a).

Subsequently, the Trial Court points out, the truck mines, including some of petitioners, organized them-

selves into groups and bid directly with the TVA and were finally able to obtain business. Much of the Welfare Fund royalty under the UMW contract went unpaid (134a-135a).

Also as pointed out by the Trial Court, there ensued in 1958 and 1959 a great number of lawsuits against truck mine operators in the Southeastern Tennessee field brought by the Welfare Fund Trustees under the National contract to collect Welfare Fund royalties alleged to be due under the contract (135a, 1037a-1039a). Also, the Protective Wage Clause, mentioned above, contained in the National Bituminous Coal Wage Agreement amendment of 1958 was inserted in the contract by UMW and the associations (1103a-1111a).

In this period of time West Kentucky Coal Company and its subsidiary, Nashville Coal Company, were heavy shippers to the TVA steam plants (122a). The Trial Court has fully covered the facts with respect to the investments of UMW in these companies (109a-112a). The substantial increases in the shipments of these companies to the TVA system commencing in 1959 are also tabulated in the Trial Court's opinion (122a). In the struggle for the TVA market UMW was aiding West Kentucky Coal Company by loans of many hundreds of thousands of dollars to enable that company to pay its welfare fund obligations under the national contract (642a-643a). The advantage which the national contract gave the UMW companies over Southern Tennessee was plainly stated by a UMW witness (860b). The effect of the West Kentucky Coal Company bids and the options which were attached to these bids and left for later acceptance

by TVA very definitely had the effect of putting a priceceiling on the Southeastern Tennessee coal prices (129a, 459a-463a).

With UMW continuing to seek to obtain a full compliance with the National Contract by the truck mines, as the Trial Court's Opinion points out, in August of 1962, UMW cancelled the truck mine labor contracts and demanded guarantees of compliance (140a). The truck mine operators organized themselves into the Sewanee Coal Operators Association and attempted to negotiate a contract with UMW based upon varying degrees of mechanization in the mines, using a sliding scale of wages (140a-141a). UMW attempted in these negotiations to obtain the signing of the National contract with guarantees for the payment of the Welfare Fund royalties by the truck mines (141a). The failure of the parties to reach any agreement was the overriding reason for the ensuing strike of the whole field which commenced December 26, 1962, as found by the Trial Court (141a).

The strike was still going on at the time of the trial of this case and it was still going on after four years at the time of the second *Pennington* case as shown in that record.

The Trial Court found that UMW has approved the strike and has supported it. As a matter of fact, UMW has sent large sums of money into the Southeastern Tennessee field to help support the distressed strikers (141a, 144a, 211a-212a).

As might be expected, where collective bargaining was confined to demands for an impossible contract and when men and their families became hungry

and desperate and as some of the operators attempted to get their properties back into operation the worse sort of industrial warfare broke out in the coalfield and continues today. The Trial Court described these events as follows:

> "The strike, which commenced on December 26, 1962, was accompanied by mass picketing at the road junctions leading to the major mine areas in the field. This strike was still continuing in 1965 at the time that proof was taken for this trial. The U.M.W. has continued support of the strikers by relief payments. Grundy Mining Company (a Tennessee Consolidated subsidiary) did not operate again until October 8, 1963, although it attempted to open in May of 1963 but was prevented from doing so by mass picketing. By February of 1963 all mines on Tennessee Products property had ceased operation due to the strike. No mining on these properties had been resumed by 1965. A great deal of violence, bloodshed and destruction of property has accompanied the strike. Much suffering deprivation and want has occurred. The Southeastern Tennessee coal field remains a blighted area. . . .
>
> "With respect to the strike which occurred on December 26, 1963, and which has been in effect since that date, the evidence is clear that the U.M.W. has sanctioned and approved the strike. The Union concedes as much. It is likewise clear that the strike has been accompanied by much mass picketing, violence and property destruction. Both sides in the dispute have suffered the effects of such violence, but the operators and those miners who sought to cross the picket lines have suffered much the worse of the violence. Without attempting to itemize the record, it may be said that homes were shot into, burned or dynamited

by unidentified assailants. Coal was dumped upon the highway. Trucks and cars were fired upon numerous times. Power poles and mine equipment were dynamited. Coal tipples were burned and mine guards were fired upon. Operators were forced to abandon their mines and equipment for reasons of personal safety, with the mines and equipment suffering heavy losses from mine flooding and vandalism. Several men were killed. One intrepid operator was the intended victim of dynamite thrown into his yard from a speeding car, but he seized the lethal bundle and removed the cap just seconds before it went off. While it certainly adds no luster to the occasion, there were victims of violence upon both sides. The home of the U.M.W. District Representative was damaged by dynamite. Four local union halls were burned. Union men were shot at and union homes were burned" (141a-142a, 144a-145a).

Our supplementary appendix gives just some of the experiences of the operators and men who were trying to work in 1963 (1158a-1160a, 1127a-1136a, 1138a-1146a).

This employer-employee relationship in Southern Tennessee has been an intolerable one, and it has been to the advantage of no one at the local level—something that men in this field on either side would obviously much like to have remedied if it were within their power to do so. The dependency of everyone in the area upon success of the industry aggravated the distress and compounded the bitterness, and the tremendous expansion of the TVA market at the back door of the coal field makes the failures all the more hard to swallow.

(b) The Truck Mines in Southern Tennessee Had No Real Chance To Survive Because of the Imposition of the National Bituminous Coal Wage Agreement.

Looking at the small truck mines on the coal properties in Southern Tennessee (including most of the petitioners), it is clear that such mines served a necessary purpose in bringing about the full recovery of coal. No national policy should dictate that only the richest and most easily recovered deposits of our national resources are to be extracted and the rest abandoned. Small truck mines were a necessity in the extraction of coal in various situations—the areas between the outcrop and larger deep mine workings, the small solid bodies of coal that lay in the fingers of the mountains, the recovery from pillars and stumps of coal in old and abandoned workings. All of these situations required small operations independent from the larger mines working on the solid body of coal deep in the mountain (206b, 1166a).

When there were large numbers of miners laid off from the larger operations that turned to mechanization, and when unemployed miners were numerous (195b, 500b) it was not a violation of any sensible policy to employ those men at wages which were much better than on any other jobs offered, even though they necessarily were below those that the larger mines could afford.

And when such small mines were opened up to remedy the shortage in coal that was desperately needed by the rapidly expanding TVA market, whose power market suddenly ballooned and multiplied by reason of the expanding atomic energy program (833b-835b) those mines were serving an essential and vital role in the nation's economy. Such operations can-

not be condemned as an offensive, unworthy and useless appendage to our society.

Tennessee Products and Chemical Corporation and Tennessee Consolidated Coal Company charged royalties for the coal extracted from their properties by the truck mines, but such charges for the exhaustion of mineral resources is as proper and fair and customary as the sale of any other property rights. There is no proof in this record that such charges were excessive or unreasonable particularly in light of the services rendered by the companies to the truck mines. The record shows that in the efforts from 1957 on, to get contracts for the truck mines with TVA, the compensation to the companies for services and removal of coal was stripped to the bare nub. (See for example 454a-459a). Incidentally, these pages show that a substantial part of the difference between West Kentucky and Southern Tennessee F.O.B. mine price was for trucking charges from mine to loading point which was no part of the expense of railroad mines in West Kentucky.

But, as the Trial Court found, the truck mines could not meet or keep pace with the constantly increasing National Bituminous Coal Wage Agreement. We submit this was obviously so. We have discussed above the announced policy of UMW to tailor the contracts to new technology, a policy favoring larger and larger combines and fewer and fewer units with the weaker units considered just a "drag on the industry." In the earlier 1950's UMW's local representatives allowed the truck mines to continue to operate and do "the best they could to satisfy the miners and keep the mines working," as found by the Trial Court (134a).

Then in 1955, after the truck mines took a substantial two year term contract from the expanding TVA market, the International Union blasted TVA for issuing contracts to Tennessee truck mines. In the last section above we have briefly traced what happened to the Southern Tennessee truck mines, with particular reference to the mines on Tennessee Consolidated property which exemplified the problems of all Southern Tennessee mines.

The same difficulties confronted truck mines on Tennessee Products' property in 1955, when the district officers of UMW stepped in to require the authorizations and commitments to withhold welfare money from the truck mines on new coal business. At that time the companies had worked out the amounts to add to truck mine payments so that the escalated TVA price under the 1955 national contract increase could be passed on to the miners and truck drivers. This was accomplished by the companies' adding five cents to the fifteen cents increase granted by TVA. By this arrangement it was believed that the truck mines would be able to comply with the necessary increases to the men. But the appearance of the district officers demanding collection of welfare money perpetuated a strike of many weeks. In the course of the strike miners assembled for the purpose of joining another union but district officers intervened, warning that there was not room for two unions, and promising relief payments while the strike continued (317b-319b, 1163a-1164a). These relief payments were made (216a). The operators finally gave in and signed the welfare collection papers with respect to withholding of money on future coal contracts.

When the old coal contracts expired in early 1957, the truck mines on Tennessee Products suffered the same experience as the mines on Tennessee Consolidated property. The added costs of the welfare payments meant no new business (1164a-1165a). Those mines faced a bleak and dismal period starting at that time (1125a-1126a). Drastic unemployment was a matter of concern to state authorities (425a-429a). Like the Bee Branch and Floyd Hollow groups on Tennessee Consolidated property, the truck mines on Tennessee Products property formed the Holly Branch and Mount Olive groups to obtain direct contracts with TVA in 1958. After these contracts the truck mine operators were sued for welfare royalties (9b). These contracts lasted until 1960. Again, these mines faced lack of work (1126a).

It was in the period from 1959 that the West Kentucky Coal Company greatly increased its share in the TVA business. The advantages that company had over Southern Tennessee in the competition under UMW contract policies is shown by UMW's own witness (860b).

The rest of the truck mine history is briefly shown in the last section above. In the Sewanee "negotiations" that commenced in November, 1962, the operators offered in good faith fair and reasonable terms based upon the character of mine operations and productivity of the various mines (545b-546b). UMW's district president rejected these as an effort to "sweetheart", saying it was a "vicious proposition" for the Southern Tennessee operators to propose "Less wages and less into the Welfare Fund than we require of your competitors" (381b).

The ensuing strike starting December 26, 1962, has been paid for (211a-212a) and encouraged by the International Union as in an article in its official Journal, on the editorial page in October of 1963, commending the strikers for fighting a battle for the union to get contracts signed with all the welfare benefits, etc. (463a-466a).

The Trial Court used apt language in describing the dismal and "blighted" condition into which the area was plunged (141a-142a, 144a-145a).

The Trial Court found the natural conditions of work in Southeastern Tennessee made it difficult to mechanize and employ machinery effectively. UMW says any mine can mechanize and comply with its contract. UMW put in its appendix a part of the testimony of the witness Thomas about the experience of his mine which was one of the most mechanized (244b, et seq.). But this proof itself shows that this mine was abandoned with Thomas owing $25,000 to the Welfare Fund after he poured $200,000 into machinery and development (247b-255b). When the failures of that mine were brought up in the Sewanee "negotiations" of late 1962, the UMW district president responded with the standard, ready answer that UMW always gives in the industry—failure must be because of bad management (544b).

(c) The Mechanized Operations of the Two Larger Companies in the Field Have Failed Under the UMW Contract Even When the Most Capable Management Firm in the Coal Industry Was Used.

Tennessee Consolidated Coal Company is not a party in these cases, but its experiences are relevant. It and the petitioner, Tennessee Products and Chemical Corporation, were the two largest operating and

coal land-owning companies in the field. Their operations were the most mechanized.

Tennessee Consolidated Coal Company probably had the most energetic management of any company in the field. Tennessee Consolidated Coal Company obtained from TVA in 1957 an incentive contract, a contract conditioned on higher productivity with decreasing price. Tennessee Consolidated already had a mechanized mine when this contract came in. This contract was the only way the company could get new business in 1957 (430b). It spent $460,000 in putting in new machinery (431b). The effort to get higher productivity failed. This was substantially related to the difficulties of mechanized mining in the Sewanee seam (443b).

But local labor turmoil had some part in this failure. This was partly related to Tennessee Consolidated's effort to improve its productivity under the contract by adding stripping and augering mining. Before acquiring the expensive surface mining equipment (437-b), and employing men, the company made an investigation to determine what other UMW strip mining operations were paying as wages in Tennessee (438b). It must be explained that the UMW "blue book" covering basic wage scale (to which subsequent flat increases were added) in Southern Tennessee does not cover surface mining but only underground wages (657b-658b, 440b-441b). After its investigation the company established the wages apparently to the satisfaction of the men (440b), paying the highest wages in Southern Tennessee (441b), when the UMW district officers brought in a "green book" of stripping rates, never seen by the company, that had been established somewhere in District 19 (440b-441b). This

caused trouble at least until November 20, 1959 (441b-442b). The company lost $96,000 in the last six months of the TVA contract ending December 31, 1959 (436-b).

At the beginning of 1960, Tennessee Consolidated cancelled its UMW contract effective in March, 1960. The mine continued to operate on limited business, until work stopped on the effective date of the cancellation (445b). In the meantime a series of meetings were held in Knoxville, Chattanooga and Palmer, Tennessee, between the company and representatives of the district and local unions. The company displayed its financial records and appealed to the union to modify the national contract terms so that wages could be paid on some form of incentive basis, or determined on the basis of productivity, so that wages would be lower than UMW scale for low productivity, but higher if productivity were high enough. The upshot was complete rejection by the union and demand for the national contract (445b-451b).

Having no hopes for reopening Coal Valley, Tennessee Consolidated turned to its newly created subsidiary, Grundy Mining Company. Grundy then in 1960, after the failure of Tennessee Consolidated's efforts to negotiate a contract, turned to Paul Gibbs, and he found he could not get started without using men from the Southern Labor Union (509b-510b). This brought on a real uproar that is dealt with in *United Mine Workers* v. *Gibbs,* 383 U.S. 715. That suit was based on violence.

The fall of 1960 rolled around with still no production. Management was under the injunction of the stockholders not to exhaust the mineral and financial

assets of the company with further heavy losses (448-b). This appears to have been a reasonable order. But the outlook was darker because the reduced rail rate from West Kentucky to Widows Creek market became effective in the fall of 1960.

The Company appealed directly to its old Coal Valley employees rather than through their union, to come to work at real good wages but not UMW scale. Production still was impossible although many were interested (1186a-1190a).

It is to be observed that the company had been criticized, not only by UMW, but by TVA, on the general ground that low productivity could only be the result of poor management. So Tennessee Consolidated, in early 1961, went out and got the best managers in the business—Allen & Garcia Company (513b).

Allen & Garcia is *the* outstanding coal mine construction and operating firm in the industry. The appendix gives a picture of the qualifications and experience of this company all over the world (1169a-1176a). But in this Southern Tennessee venture, it failed dismally, trying to operate under the National Bituminous Coal Wage Agreement.

The reasons are two: FIRST, the irregular and treacherous natural conditions in the seam of coal, the day to day experiences in which Allen & Garcia had encountered nowhere else; and, SECOND, the clamor of the men on the old Coal Valley panel for jobs on the new and fast, mobile machinery, regardless of age and ability to be trained (575b-578b, 586b-587b, 591b, 596b-597b).

This is precisely the problem that stems directly from trying to design bargaining units or units of pro-

duction around a national contract dictated from outside, rather than bargaining for terms that fit the unit so that both the company and its employees can live with each other, as contemplated in the Labor Relations Act.

When, in September, 1962, Allen & Garcia cancelled the UMW contract and resigned from the operation, Tennessee Consolidated again attempted to carry on with Grundy Mining Company, but UMW filed its NLRB petition for a representation election and the UMW district president testified that the Company advised UMW that after it was certified as bargaining agent the company's representative on contract matters would be Sewanee Coal Operators Association (1237b-1250b).

In the meantime the December, 1962—January, 1963, "bargaining" between Sewanee and Union representatives went on with Tennessee Consolidated lending its corporate officer, Houston Beaumont, a lawyer, to help out (540b). And, one of the mine classes included in the proposal of the operators to the union was one that would cover such a mine as the company's mechanical operation Gray's Creek (556b).

These "negotiations" failed and the UMW district president demanded the national contract, accusing Tennessee Consolidated of trying to "sweetheart" and carrying on "vicious" conduct in attempting to negotiate labor costs below those its competitors had to pay (380b-383b). The competitor who had put the ceiling on the market was the company owned by UMW to whom UMW was loaning $900,000 so it could pay its welfare obligations.

The unending strike and almost total warfare ensued and there can be no doubt that the Trial Court

was right in finding it came from failure of efforts to reach a contract.

Turning to the other larger company in the field, Tennessee Products and Chemical Corporation, this is the petitioner here which had Case No. 17,879 in the Court of Appeals. This company had considerable diversification in its products and had a coal mining division located on lands leased from Tennessee Coal and Iron Division of United States Steel Company in Southern Tennessee; and the stock of Tennessee Products was purchased by Merritt, Chapman and Scott in 1954.

The Reels Cove Mine of Tennessee Products employed about 250 men and was a mechanized operation, using non-mobile duck bill loaders, a type of equipment that made it a modern mine in the latter part of the 1940's and early 1950's (196b). However, the emphasis of Tennessee Products in mining coal in the Sewanee seam was on small truck mines (306b, 308b). In the latter 1950's and early 1960's, Tennessee Products was working hard in assisting truck mine operators to establish new mines with the best machinery available, it being contemplated that the machinery would be manned by men who were adaptable and capable of handling it. The effects of UMW's national contract, as with respect to the Thomas mine discussed above, were most severely felt by Tennessee Products in the truck mine phase of the coal business.

Tennessee Products, as well as its parent, Merritt, Chapman and Scott, suffered economic reverses in business outside of coal (408a-412a). Both were bound by borrowing restrictions contained in indentures held by creditors, and large funds, such as those needed for a

new, major, modern coal mine were not available in the company treasury (385b-391b).

But financing from outside customer sources would have been attained if the competitive position of Southern Tennessee had been better (391b, 397b). The company faced the same problems as Tennessee Consolidated in competing for the market with other fields, and productivity in a new mine would have had to be substantially higher if the UMW contract terms applied. Engineering projections and advice on a major new mine contemplated changes to new, mobile equipment. The Reels Cove employee panel was aging and had no experience on such equipment.

This problem of adapting an old employee panel to new machinery was encountered by Tennessee Products in connection with the new mechanized truck mines. The old Reels Cove panel insisted on these new jobs and the Company did not believe they could handle them. During this period of time a persuasive and practical example was going on in the adjacent property of Tennessee Consolidated under Allen & Garcia (399b). The conflict and turmoil that arose from this was enough to convince anyone that operations could not be carried on in this property under the national UMW contract (330b-331b, 393b-395b).

Tennessee Products' mine operating head, Howard Human, attended the Sewanee negotiations with the union (541b) where efforts to work out terms under which methods of mining could have been carried on in Southern Tennessee with old employees were rejected by the union. After the strike that ensued no more operations had been carried on upon the property of Tennessee Products (142a).

SUMMARY OF ARGUMENT

I. THE CONSTRUCTION OF THE NORRIS-LAGUARDIA SECTION 6 CLEAR-PROOF RULE BY THE LOWER COURTS WAS ERRONEOUS, REQUIRING A FACT-FINDER TO EXCUSE A UNION FOR VIOLATION OF LAW ESTABLISHED BY CLEARLY AUTHORIZED AND CLEARLY PROVEN ACTS OF ITS HIGHEST OFFICERS.

Norris-LaGuardia Section 6 provides a rule of evidence in determining agency in the commission of unlawful acts in labor disputes. The Section has nothing to do with legal standards in evaluating the legality of clearly authorized acts. The Section assumes the perpetration of acts which were unlawful. It has to do with proving the acts were authorized, not whether the acts truly were unlawful. The real question in dispute in this case is not one of authorization of acts, but rather consists of the legal standard required to be applied to acts undisputably authorized. Neither the legislative history nor the decisions of this Court concerning Section 6 supports the construction given by the lower courts.

II. THE CONSTRUCTION OF THE SHERMAN ACT BY THE LOWER COURTS WAS ERRONEOUS, PERMITTING THE DOMINANT BUSINESS GROUP AND THE DOMINANT UNION TO COMBINE TO SUPPRESS COMPETITION IN ALL UNITS WHICH CAN ONCE BE COMPELLED BY ANY MEANS TO SIGN A NATIONAL CONTRACT.

The lower courts held the PWC was legal if the requirement of paragraph A (demanded by the company associations and which put restraints on UMW's bargaining freedom) was limited to the 82% of the industry already organized under the national contract. This put a killing strait-jacket on the economic freedom of the great majority of the units in the industry. This rule is a far cry from the decision of this Court in *Pennington* and cases cited in that decision. The Trial Court expressly rejected the anti-

trust law as having application in this situation; it failed to recognize that there was an actual and effective combination at work drastically restraining trade in the industry; and the rulings below constitute a rejection of the rule in *Allen Bradley Company* v. *Local Union,* 325 U.S. 797, which Congress has allowed to stand for many years.

III. NOT ONLY IS ANTITRUST POLICY SUBORDINATED, BUT ALSO BASIC PURPOSES OF NATIONAL LABOR POLICY AND NATIONAL POLICY OF EMPLOYMENT ARE FRUSTRATED, BY THE LOWER COURT DECISIONS; THERE MUST BE A BETTER JUDICIAL RECONCILIATION BETWEEN NATIONAL LABOR POLICY AND NATIONAL POLICY OF EMPLOYMENT AS WELL AS ANTITRUST POLICY ON THE QUESTION OF NATIONAL CONTRACTING.

The decisions below really make no reconciliation of these three broad policies. They subordinate antitrust policy, allowing restraints that have wrought economic devastation to a three county area for a four year period. The lower court decisions completely frustrate the most basic purposes of labor policy, making economic strife and turmoil inevitable by permitting restraints that make it impossible for employers and employees to bargain with any freedom whatsoever. The lower court decisions ignore completely the employment policy which promotes free competitive enterprise and favors conditions which afford maximum employment (15 U.S.C. Section 1021), those decisions compelling the whole organized industry to stick to the demands of the UMW-BCOA unit that all units fire men and mechanize to the hilt or be destroyed. The Joint Economic Committee of Congress has spoken out strongly in reports authorized by the Employment Act against the very kind of anticompetitive and forced economic concentration sort of policy and rule-making that is represented in the lower court decisions.

ARGUMENT

I. THE CONSTRUCTION OF THE NORRIS-LAGUARDIA SECTION 6 CLEAR-PROOF RULE BY THE LOWER COURTS WAS ERRONEOUS, REQUIRING A FACT-FINDER TO EXCUSE A UNION FOR VIOLATIONS OF LAW ESTABLISHED BY CLEARLY AUTHORIZED AND CLEARLY PROVEN ACTS OF ITS HIGHEST OFFICERS.

A. The Trial Court Erroneously Applied the "Clear Proof" Rule.

The Trial Court said that on the preponderance of the evidence there was an implied agreement by UMW and BCOA not to bargain with any other bargaining unit upon any terms other than the national contract terms. But the Court went on to say that Section 6 of Norris-LaGuardia required "clear proof," a different standard from the ordinary civil burden of persuasion on this issue that had not been met (108a).

We contend this was an erroneous application of the "clear proof" rule because with respect to the facts, the preponderance of which establishes the implied agreement, there is no question of participation, authorization or ratification by UMW International Union. Every act upon which the Court raised this implied agreement was beyond question participated in, authorized or ratified by the International Union.

B. What Is Provided for by Norris-LaGuardia Section 6 Is a Rule of Evidence in Determining Agency.

Section 6 of Norris-LaGuardia (29 U.S.C. Sec. 106) provides:

> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear

proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

C. Section 6 Is Not Concerned With the Legal Standard To Be Applied to Acts Clearly Authorized.

Section 6 is concerned with the standard of proof of participation in, authorization or ratification of, specific acts, not with the legal standard as to what those acts mean or as to how those acts are to be interpreted under legal rules once it is proven clearly that the Union has participated in, or authorized or ratified, those acts.

Section 6 has to do with responsibility for unlawful acts. It assumes that certain acts have accomplished the breaking of some law. The section comes into play to determine whether those acts have been authorized by the defendant. This may be considered to be a two stage process, but the statute has nothing to do with the determination of the question whether the acts in question have violated some law.

The inappropriateness of applying Section 6 in a case based upon the national contracting activities of international union officers is demonstrated by the language in the concurring opinion in *Pennington* concerning a "prima facie" case. There could never be a prima facie case if Section 6 applied to the question of whether there was a violation of law.

We believe the following language from a footnote in *United States* v. *General Motors Corp.*, 384 U.S. 127, 16 L.Ed. 2d 415, 424, illustrates the distinction that must be made between fact finding and reaching legal conclusions in this situation:

"We note that, as in *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44-45, 4 L.Ed. 2d 505,

515, 80 S. Ct. 503, the ultimate conclusion by the trial judge, that the defendants' conduct did not constitute a combination or conspiracy in violation of the Sherman Act, is not to be shielded by the 'clearly erroneous' test embodied in Rule 52(a) of the Federal Rules of Civil Procedure. That Rule in part provides: 'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' As in *Parke, Davis, supra,* the question here is not one of 'fact,' but consists rather of the legal standard required to be applied to the undisputed facts of the case. See *United States* v. *Singer Mfg. Co.,* 374 U.S. 174, note 9, 10 L ed 2d 823, 838, 83 S Ct 1773; *United States* v. *Mississippi Valley Co.,* 364 U.S. 520, 526, 5 L ed 2d 268, 275, 81 S Ct 294, and cases there cited."

Similarly, here the real question in dispute is not one of authorization of acts but rather consists of the legal standard required to be applied to acts undisputably authorized.

D. The Legislative History of Section 6 Does Not Support the Application Made by the Trial Court.

The Congressional committee reports dealing with Section 6 and the bills that preceeded Section 6 in the 70th, 71st and 72nd Congresses are cited in footnotes to *United Brotherhood of Carpenters* v. *United States,* 330 U.S. 395. A review of these reports shows that no one favored the Trial Court's application of this provision. Rather it was emphasized time and time again that this provision was not intended to be a rule of substantive law but simply a rule of evidence in proving agency. In answering arguments of the opposition, the proponents insisted that this was not to be a change

in the substantive law of agency. There was certainly no intent to change legal standards governing substantive antitrust law.

E. The Previous Decisions of This Court Do Not Support the Trial Court.

The Trial Court cites *United Brotherhood of Carpenters* v. *United States,* 330 U.S. 395, and *United Mine Workers* v. *Gibbs,* 383 U.S. 715, on this proposition (108a). The *Gibbs* case was concerned solely with the real and hard question of whether the International Union had authorized or ratified the specific acts of violence which were the basis of that state law cause of action. But the case at bar presents no question of participation in, or authorization or ratification of, acts. Rather the acts here were exclusively by international officers and policy committee members and approved by International Conventions at all stages in the dealings of UMW with BCOA.

In dealing with the effect of Section 6 of Norris-LaGuardia in an antitrust case the Supreme Court said:

> "The grant of authority to an officer of a union to negotiate agreements with employers regarding hours, wages and working conditions may well be sufficient to make the union liable . . . and the custom or traditional practice of a particular union can also be a source of actual authorization of an officer to act for and bind the union." *Carpenters* v. *United States,* 330 U.S. 395, 410.

Under such language as this the "clear-proof" standard can hardly be found to be anything but a rule of evidence with respect to *proof of agency.* The Congress so considered it the only time it has dealt with

it since it was passed. When Congress made Section 6 inapplicable to suits against labor unions under Taft-Hartley, the provision was treated as a rule of agency. 29 U.S.C.A. Section 185(e). See U. S. Code Congressional Service, 80th Congress, First Session, 1947, Pages 1172-3. It is not a rule of substantive law affecting conclusions as to what clearly authorized acts mean under the law. Stretching the congressional language like this does not serve the interests of justice in whose eyes all are equal. None should come before the bar with an artificially or legislatively contrived handicap for or against them—unless there is "clear proof" that Congress wanted it that way.

II. THE CONSTRUCTION OF THE SHERMAN ACT BY THE LOWER COURTS WAS ERRONEOUS, PERMITTING THE DOMINANT BUSINESS GROUP AND THE DOMINANT UNION TO COMBINE TO SUPPRESS COMPETITION IN ALL UNITS WHICH CAN ONCE BE COMPELLED BY ANY MEANS TO SIGN A NATIONAL CONTRACT.

A. The Lower Courts Would Allow Units To Lose Their Right To Survive Simply by Once Submitting to the National Contract.

We concede that it has been established that force and violence alone do not make a violation of the Sherman Act. But this case adds one more step in the path of domination of industries by big business and big labor. If the smaller competitors can once be corraled into the national contracting system by any means, including violence or mass picketing, then it is permissible for big business by formal contract to require the union under a Protective Wage Clause to wipe them out by applying national contract terms which are ridiculously impossible in their situations. That is the holdings in the lower courts in this case with respect to the PWC. The lower courts say it is

all right to restrain UMW in its bargaining policy so long as the language does not apply to the few units that have not yet been organized under the contract.

This is a far cry from the decisions in *Associated Press* v. *United States*, 326 U.S. 1; *Fashion Originators Guild* v. *Federal Trade Commission*, 312 U.S. 457; and *Anderson* v. *Ship Owners Association*, 272 U.S. 359, 363-5, upon which Mr. Justice White relied in his opinion in *Pennington*.

It is to be noted that Paragraph A of PWC without question violates the meaning of Mr. Justice White's opinion in *Pennington* because it does, with respect to signatory operators (even under the UMW's and Trial Court's construction), restrict the freedom of action of the union in dealing with all of the bargaining units after becoming covered by the contract. It is to be remembered that if the economic necessities required a bargaining unit to seek some contract modification, certainly Paragraph A (because UMW was bound to follow it by contracts with BCOA and other bargaining units) prevents the United Mine Workers of America from dealing with that bargaining unit freely and in accordance with the interests of the economic unit involved. When petitioners' contracts were cancelled by UMW in 1962 with demands for re-signing with guarantees of compliance, they had only the alternatives of signing the same old contract impossible to perform *or to change*, or to resist and suffer the damages which they did suffer. The proof is all to the effect that it was the same contract, including the strait jacket arranged by the "oligopoly" of UMW and BCOA, rather than some other or different contract, that was presented to these companies in 1962. No explanation has been given as to how even the

UMW's construction of Paragraph A is any answer to the rule set forth in *Pennington.* The lower courts simply assumed the clause was legal if it could be construed to apply to units already organized under the contract.

B. The Trial Court's Allowance of the Restraints Contained in PWC Appears To Result From Rejection of the Sherman Act as Having Any Application to Collective Bargaining.

In his opinion the Trial Court says:

> "Moreover, to suppose that national collective Bargaining can or will be conducted with other than major procedures of an industry is a theory unrelated to the hard realities of a competitive economy. To suppose that major operators can or will be the guardians or protectors of the small and weak in the industry in such national bargaining is also largely a theory unlikely to relate to the realities of a competitive economy.
>
> "The problems posed to the small and medium sized enterprises by the practice of national collective bargaining would appear real and substantial. However, that their solution lies in the federal antitrust laws as now enacted by Congress is doubtful" (153a-154a).

In spite of the decision of the Supreme Court in *Pennington,* this was the concept of the law held by the Trial Court in disposing of the evidence in this case. It is apparent that this concept lies behind the interpretation and rejection of the majority and concurring opinions in *Pennington* as having controlling significance in this case.

Pennington has decided this proposition, and the majority opinions in that case were not a lot of meaningless words "unlikely to relate to a competitive economy."

Big business and big labor hold positions of power in this country. With power comes responsibility. When this power has been combined together to the suppression of weaker and smaller segments of the economy, in the manner shown in this record, the Sherman Act, as interpreted by *Pennington,* can be brought to bear. We believe that since the decision in *Allen Bradley* v. *Local Union,* 325 U.S. 797, and until national collective bargaining in this kind of form is expressly authorized, Congress expects Sherman to be made effective in the courts.

No other union has pushed so far this form of bargaining, reaching terms with dominant employers in the industry and then forcing identical, stereotyped terms on hundreds of lesser units. But some other unions and BCOA are interested, and some other unions as well as BCOA filed briefs and argued on the side of UMW before the Supreme Court in *Pennington.* Must a number of other industries go through the ordeals suffered by coal, until Congress steps in to preserve the basic purposes of the Sherman Act?

C. The Trial Court Failed To Recognize That Without Question There Was an Actual, Effective Combination at Work in the Coal Industry Drastically Restraining Trade.

The Trial Court's criticism of the *Pennington* concurring opinion prima facie rule itself contains a basic defect and oversight that runs through the Court's whole opinion. This is the failure to recognize the undisputable proposition that there was an *actual, working, effective combination* in the coal industry between big business and big labor (without which repeated industry-wide contracts could not have been made) that was putting an impossible squeeze on

smaller producers with the consequence of large combines taking over the production. The Trial Court never considers the evidence of the purposeful establishment of a combination of businessmen in the form of BCOA to attain the end of having "national contracts" (431a-434a). The Trial Court assumes that Mr. Justice White would approve this combination going on and on with amendment after amendment to the national contract until there was nothing left except one big combine, so long as the members of the combination did not slip up and publicly utter a predatory purpose behind it all. We do not believe that Mr. Justice White's opinion holds that the labor law authorizes industry-wide bargaining on any such basis.

Industry-wide bargaining or bargaining for a national agreement is an abnormal bargaining situation. It is not expressly recognized in the labor law and *Pennington* was the first case that challenged it under antitrust law. It differs from bargaining engaged in by a multi-employer bargaining unit, because in the multi-employer bargaining unit all of the employers who are bound by the bargaining have voluntarily engaged the multi-employer bargaining unit to represent them in the bargaining. But, the "national wage agreement" that is involved in this case is fashioned by the union with an employer representative (Bituminous Coal Operators Association) that does not represent for collective bargaining purposes all of the industry any more than does a leader of group in any other industry, there being a multitude of independent smaller bargaining units throughout the industry.

All of this multitude of bargaining units were presented with identical printed forms of contracts to sign in the years 1950, 1951, 1952, 1955, 1956 and 1958

(296a-302a, 315a, 540a, 669a). We think that this history is important in answering the question whether or not there was an effective, working combination between BCOA and UMW, and if there was, the next question under Sherman would be what was the effect of this combination on trade and competition.

This may be illustrated by the case cited in the concurring opinion footnote in *Pennington* (381 U.S. 673), *Interstate Circuit* v. *United States,* 306 U.S. 208.

The second footnote of Mr. Justice White's majority opinion, which the Trial Court placed reliance upon, says, in effect, that mere suspicion on the part of the union that the weakest units could not comply with a contract is insufficient, in itself, to support a finding of conspiracy violating the Act. It is clear that the Court, in this footnote, had its mind on the question of proving conspiracy by the common resort to proof of consequences and effects of a course of conduct of a combination, and the Court says these effects must be substantial—more than effects on the fringes of the industry.

But this does not mean that substantial effects are not to be considered as in other antitrust cases, or that direct proof of a specific predatory intent alone suffices as the Trial Court concluded. To the contrary, the very negative statement contained in this footnote leaves the reaction that, if the conduct goes beyond these bare minimums, an inference or prima facie case of conspiracy may arise.

D. When the Trial Court Excuses a Combination for Restraining Trade Because It Was Serving Some Union Purposes, This Is Contrary to the Decision in Allen Bradley.

In the leading case involving labor unions under the antitrust law, *Allen Bradley Company* v. *Local Union, supra,* Mr. Justice Black said at the outset:

> "The question presented is whether it is a violation of the Sherman Antitrust Act for labor unions and their members, *prompted by a desire to get and hold jobs for themselves at good wages and under good working standards,* to combine with employers and with manufacturers of goods to restrain competition in, and to monopolize the marketing of, such goods." [Emphasis added.]

The question in the *Allen Bradley* case was further stated:

> "The problem in this case is, therefore, a very narrow one—do labor unions violate the Sherman Act when, *in order to further their own interests as wage earners,* they aid and abet businessmen to do the precise thing which the Act prohibits." [Emphasis added.]

The answer in *Allen Bradley* was in the affirmative, even though the union's purposes were truly traditional union purposes benefiting all of that local union's members, and its types of actions came within the exemptions of the Clayton and Norris-LaGuardia Acts (325 U.S. 807). Assuming that UMW was following traditional purposes (which it clearly was not after 1950), the reliance by the Trial Court upon traditional union purposes to cancel out all the proof of combination and conspiracy in this case is a challenge to the *Allen Bradley* rule itself.

The viewpoint of the union (expressed by UMW repeatedly in this case) in the *Allen Bradley* case, was expressed by Mr. Justice Murphy in his dissenting opinion (325 U.S. 820):

> "The union here had not in any true sense 'aided' or 'abetted' a primary violation of any act by the employers. In the words of the union, it had been 'the dynamic force which has driven the employer groups to enter into agreements,' whereby trade has been affected. The fact that the union has expressed its self-interest with the aid of others rather than solely by its own activities should not be decisive of statutory liability. What is legal if done alone should not become illegal if done with the assistance of others and with the same purpose in mind. Otherwise, a premium of unlawfulness is placed on collective bargaining."

The majority of the court in *Allen Bradley* held contrary to the above expressed views of Mr. Justice Murphy in his dissenting opinion, and in spite of the fact that the purposes of the union would have been perfectly lawful and unassailable had it been acting alone, once it was established by the proven circumstances and relationships that the union was in a combination to carry out the course of conduct whereby trade was actually restrained, to the advantage of the business group with which it worked, the same union activity became illegal and in violation of the Sherman Act.

Moreover, in this case it was the associations that took the initiative to tie up UMW in its bargaining policy under Paragraph A of PWC. So this case is stronger than *Allen Bradley* in that the crucial restraint was initiated by business groups for business reasons.

Accordingly we submit it is abundantly clear that the second question presented at the beginning of this brief must be answered by holding that there was a violation of the Sherman Act by this restraint on the bargaining freedom of hundreds of units, at the instance of business groups.

III. NOT ONLY IS ANTITRUST POLICY SUBORDINATED, BUT ALSO BASIC PURPOSES OF NATIONAL LABOR POLICY AND NATIONAL POLICY OF EMPLOYMENT ARE FRUSTRATED, BY THE LOWER COURT DECISIONS; THERE MUST BE A BETTER JUDICIAL RECONCILIATION BETWEEN NATIONAL LABOR POLICY AND NATIONAL POLICY OF EMPLOYMENT AS WELL AS ANTITRUST POLICY ON THE QUESTION OF NATIONAL CONTRACTING.

A. A Reconciliation of Three National Policies Bearing on National Contracting Is Needed, But Is Not Provided by the Opinions Below.

It appears elementary that good faith collective bargaining in the various bargaining units of an industry is a principal object and purpose of National Labor Policy. It seems equally elementary that the type of "national bargaining" exemplified in this case completely frustrates that policy, in addition to the fact that it creates wholesale restraints on trade. Also it is inevitable that the local unions will fall to international union dictatorship. The pleas of local unions to the international for more realistic contracts in local situations to slow down the loss of jobs and get relief from the effects of mechanization forced by the contract have gone unnoticed in this case by the lower courts (1163a-4a, 338a-45a).

A judicial reconciliation must be had between National Labor Policy and what Title 15, Chapter 21 of U.S.C.A. calls "National Policy of Employment," including the Employment Act (15 U.S.C. Section 1021

et seq.) and the reports of the Joint Economic Committee of Congress called for by that Act, together with antitrust policy. But the lower courts have subordinated all these broad policies to one little corner of Labor Policy—the right to have multiemployer bargaining, and the lower courts take this one phase of Labor Policy (which is not expressly recognized in any statute) and blow it up to supplant all the broad policy provisions expressly stated in Antitrust, Labor and Employment statutes.

B. Antitrust Policy Has Been Subordinated.

We respectfully request the Court to consider thoroughly what has happened to the three county area involved in this case. This thing is not normal in management-labor negotiations, that whole counties with numerous communities can be shut out for four years (up to the date of trial) from practically their only source of income because the numerous employers in that field will not sign a contract that, according to the findings of the Trial Court (146a-147a) was impossible to comply with. For four years a whole area of this fair country is consigned to unemployment, hunger and economic ruin!

All across the Appalachian areas of thin seams this condition goes on and on, leaving it to Congress to strain the taxpayers with Appalachian poverty bills, and leaving it to the courts to struggle with numerous lawsuits about violence and disruption brought about by desperate and hungry men fighting with destitute employers. And the big companies prosper and make multi-million merger deals with the oil companies.

This is not a local situation. It is conceded on this record that coal as a whole industry is a marginal and

losing business under this contract except for the few big combines (102a, 841a-847a, 1042a).

The union has clearly spoken the attitude of the international officers toward "the thousands of inefficient and ill operated uneconomic mining units" which "are just a drag on the industry" and more and more of which "will fall by the board and go out of existence" (311a, 316a). This attitude on the part of the international prevailed in spite of local delegations to the conventions vociferously objecting to international contracting policy which left more and more of local members unemployed and destitute (338a-345a).

Mr. George Love, who later founded BCOA, spoke in 1949 of the hundreds of small companies he was then trying to represent and who, he then said, could not afford any increases in wage costs (399a-400a). After Love founded BCOA in 1950 and under the program of "perfect industry stabilization" (431a-434a) envisioned by Love and Moses, those hundreds of small companies have had not one increase, but seven very substantial increases with no exceptions, exemptions or alterations from the printed forms of the contract. If those hundreds of small companies could not stand the one increase in 1949, how could they possibly stand the seven increases (plus others since 1958) subsequently fashioned by BCOA and UMW?

But Mr. Love testified he was bent on seeing that no industry competitor paid lower labor costs than he paid —fully recognizing that conditions in which other units worked would make equal ability and productivity impossible (832a-835a). The union, on this record, has

completely surrendered since 1950 to Mr. Love's insistence upon this proposition. No one will ever know how much misery, despair, and social deterioration in broad areas have resulted from this convergence of viewpoints on the part of powerful men! When these results were the most obvious and glaring in 1958, these men did not relent or loosen their grasp on a suffering industry and affected areas. Rather they deliberately and coldly tightened the screws with their Protective Wage Clause!

Clearly, the record goes far beyond the marginal situation contemplated in Mr. Justice White's footnote in *Pennington*. UMW and BCOA have combined to fashion "national contracts" for a whole industry in which the vast majority of units could not comply. In the words of *Addyston Pipe & Steel Co.* v. *United States,* 175 U.S. 211:

> "It is useless for the defendants to say they did not intend to regulate or affect interstate commerce. They intend to make the very combination and agreement which they in fact did make, and they must be held to have intended (if in such case intention is of the least importance) the necessary and direct result of their agreement."

Clearly, the evidence would establish under the *Pennington* concurring opinion a case of violation by reason of the necessary consequences and effects of the industry-wide agreement. The Trial Court said so (157a), but did not think that opinion was good antitrust law. We say that it is sound law based on ordinary antitrust concepts, and the disastrous results in Southern Tennessee show why it is sound law.

C. Labor Policy Has Been Frustrated.

The elimination of the kind of conflict portrayed in Southern Tennessee was the object of the Labor Management Relations Act. That Act's introductory section, declaring Congressional policy, recites:

> "(a) This chapter may be cited as the 'Labor Management Relations Act, 1947.'
>
> "(b) Industrial strife which interfers with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.
>
> "It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce." (29 USC, 141).

At the heart of the Act's provisions implementing this policy is the provision for collective bargaining between an employer and his employees—characterized

by Mr. Justice White in *United Mine Workers* v. *Pennington* (First Pennington) 325 F.(2) 804, Rev'd. 381 U.S. 657 (1965), as a "duty to bargain unit by unit." Multi-Employer Bargaining does not detract from this principle. "Bargaining" means *bargaining* regardless of what sized unit is actually participating—not imposing terms dictated from outside.

If this duty is abrogated, if the rights of either side to bargain out and settle differences between them in a lawful, binding and written agreement, is taken away by reason of a strait-jacket arrangement or agreement reached by employer or employee representative with some outside group, what is the outcome to be expected? Was Congress all wrong in saying that industrial strife will be relieved by the provision for free collective bargaining?

More specifically with respect to the situation in Southern Tennessee and with particular reference to small truck mines, what was to be expected if rights to collective bargaining were stripped away, and an impossible contract were imposed on small mines working in difficult conditions; if the only way people could keep on working in the only work they had to do was to work out subrosa or bootleg verbal deals informally and with differing and shifting groups without formal authority, with all the inevitable confusion and misunderstandings that would arise therefrom?

Or with reference to the larger companies in their operations, what was to be expected if an iron bound policy dictated from outside forced them to abandon methods of operation long pursued with aging panels of employees, experienced and capable on the old type of machinery, but creating risks to safety and efficiency

that were unbearable when they were placed on the fast and dangerous mobile equipment required in making efforts to survive under the rules imposed from outside? What was the foreseeable result if the only alternative was to change from methods that the employer-employee unit was capable of doing to methods which necessarily disrupted that unit and required a dismemberment of the working force with all men clamoring for jobs—an alternative forced by terms not designed for the unit as it existed, but tailored to fit some other kind of operation, whose chances of success in the existing natural conditions were limited at best.

We say that the answer to these questions is that the results to be expected are exactly the picture that has developed in Southern Tennessee.

The UMW condemns in one package *all* of the scores of operators in Southern Tennessee as *all* being lacking in ability and unsuitable to carrying on business in the industry. UMW would likewise condemn the bulk of the industry across the country since most of it is suffering losses under its national contract (102a, 841a-847a, 1042a).

D. Employment Policy Has Been Ignored.

The record in this case proves conclusively (but without any consideration from the lower courts) how a national bargaining policy fitted to the largest units, compels a company, without good faith bargaining, to fire men and mechanize to the hilt or be destroyed, and this is directly contrary to the employment policies expressed in 15 U.S.C. Section 1021. As related in the Trial Court's opinion, the unemployment and economic devastation has been appalling. And the "two man bargaining teams" (as described by UMW and

BCOA records, 298a, 432a) sit in judgment on the economic life of whole areas of this country.

In the very month that the Trial Court filed his opinion in this case with the above quoted views of the Sherman Act, on March 17, 1967, the Senate released the report called for by the Employment Act, this being the Report of the Joint Economic Committee of Congress on the January Economic Report of the President (Report No. 73, Senate, 90th Congress, 1st Session). This joint Congressional report pointed out the dangerous tendency in many industries towards increased concentration and said at pages 25-26:

> "By reducing or inhibiting concentration in such industries and increasing the role of market forces, antitrust can materially complement other public economic policies. But if antitrust enforcement is to play such a role, greater vigor and more imagination are required, for, in recent years, far too little significant action has been taken. While price-fixing, bid rigging, and other forms of overt collusion have often been prosecuted by Federal agencies, too few cases have been brought to stem the merger tide and virtually nothing of consequence has been done to reduce the high levels of concentration in oligopolistic industries.
>
> * * *
>
> "If the public is to be protected under these circumstances, the only answer—and it is an unappealing one to those of us who are strong proponents of a free enterprise system—may be some sort of statutory price-wage surveillance and, perhaps, actual controls.
>
> * * * * * * * *
>
> "Against this backdrop, the vital role of antitrust—as a means of achieving and preserving

competition so that principal reliance can legitimately be placed on the market to keep prices and wages in rough conformance with changes in productivity—becomes strikingly apparent. Of course, the maintenance of competition calls for more than just antitrust enforcement: *government regulation must be shaped to encourage rather than frustrate competition,* procurement practices must not have the effect of promoting monopoly, and other *public policies must be continuously appraised with the overriding objective of further competition.* But in the last analysis antitrust enforcement must assume the primary role in increasing the competitive tone of the economy. And without a highly competitive economy, it may be impossible—without distasteful Government controls—to achieve a rapid rate of economic growth without serious and unacceptable inflation. This is why we think a more aggressive and more comprehensive program of antitrust enforcement is not only needed but is crucially related to the goals of the Employment Act." [Emphasis added.]

E. The Pennington Decision Has Been Taken Apart by the Opinion Below.

Obviously, if the Trial Courts are right in this case and in the second *Pennington* case, the door is wide open to big business and big labor to defeat Sherman's fundamental purposes. The Supreme Court in *Pennington* put up a road block clearly required by Sherman. If that road block can be demolished (as it has been) by the reasoning of the Trial Courts in these cases, on the kind of records made in these cases, the Trial Court is right in saying the Sherman Act means nothing so long as big business and big labor see eye-to-eye.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, petitioners request this Court to reverse and set aside the judgments of the Sixth Circuit herein complained of, as well as the District Court's judgments, and to remand the cases with directions that UMW be adjudged in violation of the Sherman Act and that a new trial be granted for the determination of damages suffered by petitioners under 15 USC Section 15, or, in the alternative, that petitioners be granted a new trial.

Respectfully submitted,

JOHN A. ROWNTREE
1412 Hamilton Bank Building
Knoxville, Tennessee 37902,

CLARENCE E. WALKER
Pioneer Bank Building
Chattanooga, Tennessee,

WILLIAM M. ABLES, JR.
304 W. Third Street
South Pittsburg, Tennessee,

SIZER CHAMBLISS
610 Maclellan Building
Chattanooga, Tennessee,

A. ALLAN KELLY
South Pittsburg, Tennessee,

Attorneys for Petitioners.